(15)

No. 01-706-CSX Title: Rex R. Sprietsma, Administrator of the Estate of Jeanne Sprietsma, Deceased, Petitioner
v.
Mercury Marine

Docketed:
November 20, 2001 Court: Supreme Court of Illinois

Entry	Date	Proceedings and Orders
	Nov 14 2001	Petition for writ of certiorari filed. (Response due December 20, 2001)
	Dec 20 2001	Brief of respondent Mercury Marine in opposition filed.
	Jan 2 2002	DISTRIBUTED for Conference of January 18, 2002
	Jan 2 2002	Reply brief of petitioner Rex R. Sprietsma filed.
	Jan 22 2002	Petition GRANTED. SET FOR ARGUMENT October 15, 2002. **********
	Feb 6 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including March 29,2002.
	Mar 29 2002	Brief amicus curiae of United States filed.
	Mar 29 2002	Joint appendix filed.
	Mar 29 2002	Brief of petitioner Rex R. Sprietsma filed.
	Mar 29 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Mar 29 2002	Brief amici curiae of Missouri, et al. filed.
	Apr 4 2002	Order extending time to file respondent's brief on the merits to and including May 20, 2002.
	Apr 5 2002	Order extending time to file respondent's brief on the merits to and including May 20, 2002.
	May 20 2002	Brief amici curiae of National Association of Manufacturers, et al. filed.
	May 20 2002	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	May 20 2002	Brief amicus curiae of Maritime Law Association of the United States filed.
	May 20 2002	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	May 20 2002	Brief of respondent Mercury Marine filed.
	May 23 2002	Application (01A927) of petitioner for an extension of time to file the reply brief on the merits, submitted to Justice Stevens.
	May 23 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	May 24 2002	Application (01A927) granted by Justice Stevens extending the time to file until June 26, 2002.
	Jun 17 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jun 26 2002	Reply brief of petitioner Rex R. Sprietsma filed.
	Jul 3 2002	Lodging consisting of twenty sets of documents including1. Brief for Defendant-Appellee Mercury Marine in IL Supreme Ct., 2. Brief of Defendant-Appellee in Appellate Ct. of IL, 3. Defendant Mercury Marine's Mtn.

2 pp

No. 01-706-CSX

Entry	Date	Proceedings and Orders
		to Dismissin Circuit Ct. of Cook County, IL, submitted by counsel for the petitioner.
	Jul 23 2002	CIRCULATED.
	Aug 20 2002	Record filed.
	Oct 15 2002	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court Of The United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the same issue raised by *Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief stating the federal government's view that such claims are not preempted. *Lewis*, however, settled after oral argument, before any decision was rendered. This case presents the first meaningful opportunity for the Court to consider this preemption issue since *Lewis*. The question presented is:

Whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), preempts state common law claims that a recreational motor boat was defectively designed because it lacked a propeller guard when: (1) the Act expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to propeller guards; and (3) the United States has taken the position that common law no-propeller-guard claims do not conflict with or otherwise frustrate any federal statutory or regulatory purpose?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Rex R. Sprietsma, Administrator of the Estate of Jeanne Sprietsma (as appellant) and respondent Mercury Marine, a Division of Brunswick Corporation (as appellee).

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. 1-22) is reported at 197 Ill.2d 112 (2001). The opinion of the appellate court (App. 23-38) is reported at 729 N.E.2d 45 (2000). The unreported order of the trial court (App. 39) was entered on November 20, 1998.

JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The Coast Guard has not issued any regulations governing propeller guards on recreational vessels. The agency considered developing a regulation requiring propeller guards on all recreational boats, but it decided not to do so. The Coast Guard's decision not to take any regulatory action with respect to such devices was not the subject of any formal rulemaking.

STATEMENT OF THE CASE

This case presents the question of whether a state common law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993) ("Boat Safety Act" or "Act"), and by a decision of the United States Coast Guard not to begin developing a regulation that would have required the use of propeller guards on all recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted by federal law, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court in a case that was settled after oral argument, took the position that no-propeller-guard claims like petitioner's are not preempted by federal law. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288). In so doing, the lower court disregarded repeated teachings of this Court that the federal government's own view of the preemptive effect of agency regulations is entitled to "susbstantial weight." *E.g., Medtronic v. Lohr, Inc.*, 518 U.S.

470, 496 (1996) (majority opinion); *id.* at 505-07 (Breyer, J., concurring). The Illinois Supreme Court's decision, which is in direct conflict with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* App. 2. The National Boating Safety Advisory Council (the "Advisory Council") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4).

Under the Act, the Coast Guard's authority to issue minimum safety standards is permissive, not mandatory. *Id. See also* S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In addition, the Coast Guard is prohibited from establishing regulations that would compel substantial alterations of existing boats unless compliance with

those regulations would "avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(2). The Act sets forth the procedures that the Coast Guard must follow to prescribe such regulations, including the actual publishing of a proposed safety standard and the express provision of a future effective date after its initial publication. *See* 46 U.S.C. § 4302(b). Thus the Act

> requires certain actions by the [Coast Guard] in the development of safety standards . . . In addition to the specific procedural requirements outlined in the [Act], the [Coast Guard], in promulgating standards, is required to comply with the formal rulemaking procedures in the Administrative Procedure Act (5 U.S.C. 553).

S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1340. Under this scheme, any party adversely affected by a standard prescribed under the Act is entitled to seek judicial review of the standard in accordance with the Administrative Procedure Act. *Id.*

The Boat Safety Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated

> equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an anti-preemption provision, or savings clause, that expressly preserves all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not to Regulate Propeller Guards.

In 1988, in response to increasing controversy over – and litigation with respect to – the dangers of unguarded boat propellers, the Coast Guard formed a subcommittee of the Advisory Council that included members of the boating industry and the general public (the "Subcommittee"). The Subcommittee was charged with investigating the feasibility of requiring guards to prevent underwater propeller accidents and opining whether "the Coast Guard should move toward a federal propeller guard requirement." App. 3. In November 1989, based in part on its conclusion that propeller guards "could create other safety concerns" (App. 3), the Subcommittee recommended that the "Coast Guard should take no regulatory action to require propeller guards." App. 3. This

recommendation was then adopted by the Advisory Council and forwarded to the Coast Guard for its consideration. App. 3.

On February 1, 1990, the agency adopted the Advisory Council's recommendation that "the Coast Guard should take no regulatory action to require propeller guards." App. 3. In a letter setting forth the rationale underlying the agency's decision not to begin the formal regulatory process, Rear Admiral Robert T. Nelson explained the Coast Guard's position on propeller guards as follows:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 40. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding development and testing of new propeller guarding devices . . ." App. 40-41.

At no point did Rear Admiral Nelson's letter – or anything else issued by the Coast Guard – indicate that the agency had concluded that propeller guards are dangerous. In addition, although the agency was well aware of ongoing lawsuits filed by a number of propeller-strike victims, *see* Report of the Propeller Guard Subcommittee of the National Boating Safety

Advisory Council, November 7, 1989, at 4, Rear Admiral Nelson's letter contains no indication that the agency ever intended to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's 1990 decision not to begin the process of developing a regulation to require propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the Administrative Procedure Act. *See* 5 U.S.C. § 553 (1994). To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.[1]

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[1] The Coast Guard has, however, continued to study various policy proposals to prevent propeller-related injuries. In 1995, for example, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards on these vessels," a request occasioned by a serious accident involving a houseboat. *See* 60 Fed. Reg. 25,191 (1995). In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 12,123 (1996). And, in 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). Because it received few responses to that request, the Coast Guard extended the period for comments. *See* 62 Fed. Reg. 44,507 (1997). To date, the rulemaking is still open, and the Coast Guard is still considering what action, if any, to take with regard to propeller guards. *See* 64 Fed. Reg. 21,566 (1999).

B. The Proceedings Below

This case arose out of a boating accident in Tennessee state waters in which the petitioner's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. App. 1. As a result, she suffered serious injuries and later died. App. 1. The boat was equipped with a 115-horsepower outboard motor that did not contain a propeller guard. The motor was designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. App. 1, 23.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. App. 1. He filed a wrongful death action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages for his wife's pain and suffering, along with the financial losses suffered by him and his son. App. 1. The complaint alleged that the boat engine was defectively designed because it was not equipped with a propeller guard. App. 24.

Respondent moved to dismiss on the ground that Mr. Sprietsma's claims are preempted by the Boat Safety Act and by the Coast Guard's decision not to regulate propeller guards. The trial court granted the motion to dismiss, finding the claims to be preempted. App. 39. The appellate court affirmed, holding that the claims are expressly preempted by the Boat Safety Act. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but nonetheless held that petitioner's claims are impliedly preempted by federal law. App. 16. At the outset, the court held that the case is not subject to the strong presumption against federal preemption

that ordinarily applies to health and safety issues – "matters which have traditionally come within the jurisdiction of the state through its police powers." App. 5 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996)). Relying on this Court's recent decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the Illinois Supreme Court declined to apply any presumption against preemption in this recreational boating case on the theory that, "[a]lthough Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case." App. 6.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "compliance with this chapter . . . does not relieve a person from liability at common law or under state law," precludes any finding of express preemption of common law claims. App. 9-10. The Illinois Supreme Court went on to hold, however, that petitioner's claims are impliedly preempted by federal law because a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards (yet retains the authority to do so if it so chooses), the court found that the agency's regulatory *in*action amounted to an affirmative decision to preclude any common law claims seeking to hold a manufacturer liable for failing to install propeller guards. In the court's view, "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16 (citations omitted).

In so ruling, the lower court chose to disregard the United States' only articulated view on the matter: the anti-preemption position set forth in the Solicitor General's *amicus curiae* brief in *Lewis*, which argued that "[t]he Coast Guard's conclusion in 1990 that the available data did not justify the issuance of regulations concerning propeller guards *is not a basis for implied conflict preemption of petitioners' common law tort claims*." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288) (emphasis added). The *Lewis* brief emphasized that "[t]he Coast Guard has never formally determined that a requirement [of propeller guards] would be contrary to the interests of boat safety." *Id.* The United States further noted that,

> [i]f it had reached that conclusion, the Coast Guard may well have prohibited propeller guards. The Coast Guard stated only that the "available propeller guard accident data do not support imposition of a regulation requiring propeller guards."

Id. Given this fact, and the absence of any federal regulation governing propeller guards, the United States concluded that the petitioners' claims did not in any way conflict with the federal regulatory scheme. *Id.* at 25-30.

In the face of these arguments, the Illinois Supreme Court ultimately held that the United States' no-preemption position in *Lewis* was not persuasive because, among other things, "[t]he Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court." App. 18. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Same Federal Preemption Issue that this Court Considered in *Lewis*, But Could Not Resolve Because *Lewis* Settled After Oral Argument.

This case presents the same issue of federal preemption that was before the Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether state common law tort claims that a boat was defectively designed because it lacked a propeller guard are preempted by federal law. In *Lewis*, the United States submitted an *amicus curiae* brief arguing that, because the Coast Guard never issued any regulations relating to propeller guards, common law no-propeller-guard claims do not conflict with or undermine any federal regulatory purpose. *Lewis* settled after oral argument, so no opinion was ever rendered in the case. The lower courts remain split on the issue, with one state supreme court (Texas) holding that no-propeller-guard claims are not preempted and a host of federal courts and the Illinois Supreme Court holding just the opposite (*see infra* at II).

The decision below is the first meaningful opportunity for this Court to review the propeller-guard issue in the wake of *Lewis*. The same question was presented in *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001), but the respondent declared bankruptcy shortly after the petition was filed and the writ was denied. The Illinois Supreme Court's ruling in this case is the first decision on the propeller-guard question rendered by a state high court or federal court of appeals since the denial of review in *Lady*.

Thus, this case presents the first opportunity since *Lewis* for this Court to resolve this important issue of federal law.[2]

II. There is a Direct Split of Authority as to Whether No-Propeller-Guard Claims are Preempted by the Boat Safety Act.

Review is also warranted because there is a direct split between the Supreme Court of Texas and the Illinois Supreme Court (along with three federal circuit courts) as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Boat Safety Act neither expressly nor impliedly preempts no-propeller-guard claims. The court emphasized the strong presumption against federal preemption of state common law claims – a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, *Moore* rejected the boat manufacturer's claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses – and expressly preempts – common law claims. 889 S.W.2d at 250.

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[2] In fact, in opposing review in *Lady*, the bankrupt defendant urged this Court to await review of the decision in *this* case, arguing that Mr. Sprietsma's claims against a non-bankrupt boat manufacturer would present a more suitable vehicle for review. *See* Respondent's Brief in Opposition at 24, *Lady v. Outboard Marine Corp.*, No. 00-1031.

The Texas Supreme Court also rejected the boat manufacturers' argument that the plaintiff's no-propeller-guard claims were impliedly preempted under the Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to commence rulemaking did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting no-propeller-guard claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the [Act's] savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer – installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). *Moore* concluded that, although "[w]e recognize the potential for conflict, [we] do not think it justifies a holding of preemption." *Id.* at 251-52.

The decision below is squarely in conflict with *Moore*. Although the two courts agree that there is no express

preemption of common law claims under the Boat Safety Act (in light of the Act's savings clause), the Illinois Supreme Court split with *Moore* in holding that no-propeller-guard claims are impliedly preempted by the Coast Guard's regulatory inaction. To reach this conclusion, the lower court began by abandoning a core proposition of law embraced in *Moore*: that such claims are subject to a strong presumption against federal preemption. *See* App. 6. Having jettisoned the presumption against preemption, the lower court went on to conclude – again directly contrary to the holding in *Moore* – that "[a] damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the [Boat Safety Act]." App. 16. Such an outcome, the court held, "would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the [Boat Safety Act]." App. 16.

Thus, the decision below is manifestly at odds with the Texas Supreme Court's decision in *Moore*. In addition, as the lower court recognized, this split is reflected in numerous other court decisions regarding the scope of preemption under the Boat Safety Act, including *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995), *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 1113 (1998), and *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct. 1402 (2001). *See* App.16 (collecting cases). Review is warranted here to finish the job started in *Lewis*: to resolve this split, prevent further confusion among the lower courts, and ensure that state

common law claims that Congress intended to preserve are not preempted.[3]

III. The Decision Below Conflicts with Relevant Decisions of this Court.

Review is also warranted because the lower court's ruling conflicts with decisions of this Court in at least three ways: first, it improperly affords preemptive effect to federal regulatory inaction; second, it improperly abandons the long-standing presumption against preemption; and, third, it fails to give any – let alone sufficient – weight to the federal government's own interpretation of the preemptive effect of the Coast Guard's decision not to regulate propeller guards.

A. The Lower Court Erroneously Afforded Preemptive Effect to the Federal Government's Regulatory Inaction.

To begin with, the Illinois Supreme Court's holding that the Coast Guard's decision *not* to commence rulemaking with respect to propeller guards has preemptive force directly conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle

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[3] Unless this split is resolved, the viability of no-propeller-guard claims in Texas will depend entirely on whether a case proceeds in state or federal court.

safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered the federal regulatory agency to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express preemption because there was no federal standard in place regarding antilock brakes in trucks. *See* 514 U.S. at 286. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.* Regarding implied preemption, the Court ruled, first, that "it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id.* at 289. Frustration of federal objectives was also not an issue, in the Court's view, because

the federal regulation "currently has nothing to say concerning [antilock brake] devices one way or another, and [the federal agency] has not ordered truck manufacturers to refrain from using [such] devices. A finding of liability against petitioners would undermine no federal objectives or purposes with respect to [antilock brake] devices, since none exist." *Id.* at 289-90.

The decision below is squarely at odds with *Myrick*. In finding federal preemption of petitioner's no-propeller-guard claim, the Illinois Supreme Court embraced the very proposition that was rejected in *Myrick*: that an agency's decision not to regulate has the same preemptive force as a decision to regulate. This ruling has the perverse effect of transforming a federal decision *not* to commence rulemaking regarding propeller guards on motor boats into an affirmative decision to *ban* any common law claim seeking to require a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted).

The lower court also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 514 U.S. at 286. As explained above, the Coast Guard's

decision not to commence rulemaking regarding propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 40. Due to the lack of a "universally acceptable" solution, and the high statutory threshold of having to demonstrate that federal regulation would "avoid a substantial risk of personal injury to the public," 46 U.S.C. § 4302(c)(2), the Coast Guard declined to commence rulemaking to consider a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. App. 40. Contrary to the Illinois Supreme Court's apparent reasoning, this determination would be entirely consistent with a state's decision to allow some boat manufacturers to be held liable for failing to install a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, as *Moore* recognized, the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case of manufacturer liability in some states." 889 S.W.2d at 252. Despite this recognition of on-going litigation regarding propeller guards, the agency never suggested that it intended to preempt such actions in the future. *See* App. 40-41. "Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller

guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to commence rulemaking was the product of internal deliberations by an advisory subcommitee (as opposed to the notice-and-comment rulemaking procedures mandated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994)), and was embodied in an informal letter to the Chairperson of the Advisory Council setting forth the agency's decision not to regulate propeller guards. App. 40-44. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found based on regulatory inaction. *Isla Petroleum*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to commence rulemaking with regard to propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake

requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption does not exist under these circumstances.

The Illinois Supreme Court's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the lower court's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on States' regulatory power and/or strip individuals of their common law remedies. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip the States of their historic power to protect the health and welfare of their citizens. Review is warranted to prevent this deep encroachment on the rights of the States to protect their citizens and of citizens to use the common law to protect themselves – rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

B. The Lower Court Erroneously Disregarded the Presumption Against Preemption.

Review is also warranted to correct the lower court's decision to abandon any presumption against preemption of common law claims in all cases in the "maritime" context – even those involving a small recreational boat in state waters.

See App. 6. This approach does violence to the rights of the States to provide compensation for their citizens and flies in the face of long-standing decisions of this Court recognizing a strong presumption against federal preemption in health and safety matters. *See generally Medtronic*, 518 U.S. at 485.

The lower court's error stemmed in part from a misreading of this Court's recent decision in *Locke*, 529 U.S. 89 (2000), which involved state regulations of the operation and design of ocean-going oil tankers used in international commerce. *Locke* merely held that, in a case where "[t]he state laws in question bear upon national and international *maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given Congress' longstanding authority "to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations." *Id.* at 98. The Court also expressed concern that regulations governing international ocean-going oil tankers implicated "the substantial foreign affairs interests of the Federal Government." *Id.* at 97.

These concerns have no bearing here. First, this case is entirely unrelated to "interstate navigation," as the accident that harmed petitioner occurred on Tennessee waters. Second, this case has nothing to do with "maritime commerce," international or otherwise, as the Boat Safety Act merely involves federal regulation of *recreational* vessels, such as the boat that struck petitioner's wife. *See* 46 U.S.C. § 4301. Finally, the United States' "foreign affairs interests" – so paramount in *Locke* that "the governments of 13 ocean-going nations expressed their concerns [about conflicting state regulations] through a

diplomatic note" (429 U.S. at 97) – are clearly not implicated here. The United States has no greater interest in maintaining presumptively exclusive authority over safety features on small recreational boats than it has regulating medical devices, cigarettes, and myriad other products over which the federal government has authority and yet the presumption against preemption has been applied by this Court with full force. *See, e.g., Medtronic*, 518 U.S. at 485 (medical devices); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes).

At the same time, *Locke* reaffirmed that the "beginning assumption" against preemption continues to apply in cases involving the "historic police powers of the States." 429 U.S. at 107 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Numerous prior decisions of this Court have made clear that such powers may be exercised concurrently with the federal government's jurisdiction over maritime matters, *see, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937), and that, absent express Congressional intent to preempt the entire field of state law, preemption only lies where the conflict between state and federal law is "so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly*, 302 U.S. at 10 (citations omitted). *See also Askew*, 411 U.S. at 341; *Huron*, 362 U.S. at 444. Nothing in *Locke* suggests that these cases are no longer good law, or that the presumption against preemption no longer applies in cases – such as this one – that involve the historic police powers of the states to compensate accident victims through the tort system. *See, e.g., Medtronic*, 518 U.S. at 488. Review is warranted to correct the Illinois Supreme Court's unwarranted holding to the contrary.

C. The Lower Court Erroneously Disregarded the United States' Own Interpretation of the Preemptive Effect of the Coast Guard's Regulatory Inaction.

Finally, review is warranted because the lower court improperly disregarded this Court's repeated teachings that the views of the federal government are entitled to deference when determining the preemptive effect of an agency's regulatory decisions. As this Court held in *Medtronic*, the United States' interpretation of the scope of preemption is entitled to "substantial weight." 518 U.S. at 496 (majority opinion); *id.* at 505-07 (Breyer, J., concurring). *See also Geier v. Honda*, 529 U.S. 861, 885 (1999) (federal government's interpretation of preemptive scope of agency regulations is entitled to "special weight"); *Hillsborough County*, 471 U.S. at 714-15 ("[t]he [federal government's] statement is dispositive on the question of implicit intent to pre-empt unless either the agency's position is inconsistent with clearly expressed congressional intent, . . . or subsequent developments reveal a change in that position") (citations omitted). Deference to the federal government's understanding of the Boat Safety Act is particularly appropriate where, as here, the United States is *ceding* authority to the states, not trying to claim power for itself. The concern behind the preemption doctrine – protection of federal interests from inconsistent state or local activity – is not implicated where the United States itself does not object to – and indeed welcomes – state participation. *See Hillsborough County*, 471 U.S. at 714-15.

The lower court paid lip service to these principles, but then substituted its judgment for that of the United States in holding that petitioner's common law claims are impliedly preempted by federal law. Such an approach was warranted, in the lower court's view, because the United States had not entered an

appearance before it – even though the federal government's brief in *Lewis* was made part of the record in this proceeding. This reasoning simply makes no sense: an *amicus curiae* brief filed by the Solicitor General's office represents the United States' official position on an issue whether or not the United States has entered a formal appearance in a case.

The lower court also held that the *Lewis* brief is not entitled to deference because "arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*." App. 18. This argument is simply wrong. With reference to implied conflict preemption (which is the issue before this Court), the United States in *Lewis* argued that the absence of any federal regulation of propeller guards, coupled with the absence of any federal determination that a requirement of propeller guards would be contrary to boat safety, meant that a common law damage claim such as petitioner's "would not in any way conflict with the federal regulatory scheme." Brief for United States as *Amicus Curiae* Supporting Petitioners at 26, *Lewis v. Brunswick Corp.*, 522 U.S. 978 (1997) (No. 97-288).

This argument is entirely consistent with, and not in any way undercut by, this Court's recent decision in *Geier*. Regarding implied conflict preemption, *Geier* held that a common law claim that an automobile was defective because it lacked an airbag conflicted with a complex federal regulation that was carefully designed to "bring about a mix of different [passive restraint] devices introduced gradually over time." *See* 529 U.S. at 874. On this latter point, this Court's holding was narrowly confined to the particular regulation at issue, and has no bearing on whether a no-propeller-guard claim like petitioner's would conflict with the U.S. Coast Guard's regulatory *in*action regarding propeller guards.

At the same time, in one key respect that went unmentioned by the lower court, *Geier* confirms that the Texas Supreme Court got it exactly right. In *Geier*, the United States had filed an *amicus curiae* brief arguing that no-airbag claims would conflict with federal regulatory purposes. This Court ultimately deferred to that position, holding that the United States' interpretation of the preemptive effect of agency action is entitled to "special weight." *Geier*, 529 U.S. at 875. Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position on the preemptive effect of the Coast Guard's regulatory inaction the deference it deserves.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

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Docket No. 89492 – Agenda 17 – March 2001
REX R. SPRIETSMA, Adm'r of the Estate of Jeanne Sprietsma, Deceased, Appellant, v. MERCURY MARINE, a Division of Brunswick Corporation, Appellee.

JUSTICE GARMAN delivered the opinion of the court:

This issue in this case is whether the Federal Boat Safety Act of 1971 (FBSA) (46 U.S.C. §4301 *et seq*. (1994)) preempts state common law causes of action based on the manufacturer's failure to install propeller guards on boat engines. In July 1995, while boating in Tennessee, plaintiff's decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. As a result, she suffered serious injuries that resulted in her death. The boat was equipped with a 115-horsepower outboard motor, which did not contain a propeller guard. The motor was designed, manufactured, and sold by Mercury Marine.

The decedent's husband, Rex Sprietsma, filed a wrongful-death action against, among others, Mercury Marine, seeking to recover damages for decedent's pain and suffering along with the pecuniary loss suffered by himself and his son. Mercury Marine filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 1998)) on the grounds that Sprietsma's claims were expressly preempted by the language of the FBSA's preemption clause and were also impliedly preempted. The circuit court of Cook County granted Mercury Marine's motion to dismiss, finding the claims to be impliedly preempted. The appellate court affirmed, holding that the common law claims for failure to install propeller guards were expressly preempted. 312 Ill. App. 3d 1040. We granted Sprietsma's petition for leave to appeal pursuant to Supreme Court Rule 315 (177 Ill. 2d R. 315). As

this case is an appeal from a section 2-619 motion to dismiss, our review is *de novo*. *Carver v. Nall*, 186 Ill. 2d 554, 557 (1999).

A. The Federal Boat Safety Act of 1971 and the Coast Guard's Decision Regarding Propeller Guards

Congress enacted the FBSA "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating-presently the Secretary of Transportation." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333. Due to an increase in the number of boat-related accidents and fatalities, Congress enacted the FBSA to establish "a coordinated national boating safety program." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1331, 1334-35. To implement this goal, the FBSA authorized the Secretary of Transportation (Secretary) to prescribe regulations necessary to establish minimum safety standards for recreational boats. 46 U.S.C. §4302(a) (1994). The Secretary may delegate regulatory functions to an organization or agency under his supervision (46 U.S.C. §4303(a) (1994)) and, in fact, has delegated the regulatory authority to the Commandant of the United States Coast Guard (49 C.F.R. §1.46(n)(1) (1999)). Before issuing a regulation, the Coast Guard must consult with the National Boating Safety Advisory Council (Advisory Council) to consider the need for a regulation and the extent to which the regulations will contribute to recreational boating safety. 46 U.S.C. §4302(c)(1) through (c)(4) (1994).

In 1998, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors.

The Coast Guard directed the Advisory Council to review the available data on prevention of propeller-strike accidents and to assess the feasibility and potential safety advantages and disadvantages of propeller guards. The Advisory Council appointed a Propeller Guard Subcommittee (Subcommittee) to review and analyze the data and to consider whether the Coast Guard should move toward a federal propeller guard requirement. National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee, November 7, 1989, at Appendix A.

After studying the issue and conducting public hearings, the Subcommittee unanimously recommended that the "Coast Guard should take no regulatory action to require propeller guards." Report of the Propeller Guard Subcommittee, at 24. The Subcommittee made this recommendation after finding that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades. Report of the Propeller Guard Subcommittee, at 19-21.

The Subcommittee's report was presented to the Advisory Council, which accepted and adopted the recommendations. Minutes of the 44th Meeting of the National Boating Safety Advisory Council 19 (November 6-7, 1989). The report and recommendations were then sent to the Coast Guard, which adopted the Advisory Council's recommendations, including its recommendation that no regulatory action should be taken to require propeller guards because "[a]vailable propeller guard accident data [does] not support imposition of a regulation requiring propeller guards on motorboats." Letter from Robert T. Nelson, Rear Admiral, U.S.

Coast Guard, Chief, Office of Navigation Safety and Waterway Services, to A. Newell Garden, Chairman, National Boating Safety Advisory Council (February 1, 1990).

B. Federal Preemption

Pursuant to the supremacy clause of article VI of the United States Constitution, the laws of the United States "shall be the supreme Law of the Land *** any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Thus, state law is without effect if it conflicts with federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 422, 112 S. Ct. 2608, 2617 (1992). Consideration of issues arising under the supremacy clause begins with the assumption that the historic state police powers are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422, 112 S. Ct. at 2617. Thus, the ultimate question in any preemption analysis is to determine the intent of Congress. *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422, 112 S. Ct. at 2617.

Federal law can preempt state law under the supremacy clause in three circumstances: (1) where Congress has expressly preempted state action (express preemption); (2) where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from state realm (implied field preemption); or (3) where state action actually conflicts with federal law (implied conflict preemption). *Cipollone*, 505 U.S. at 516, 120 L. Ed. 2d at 422-23, 112 S. Ct. at 2617; *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74, 110 S. Ct. 2270, 2275 (1990). Our focus in this case will deal with express and implied conflict preemption.

The parties dispute whether our analysis should begin with a presumption that federal law does not preempt Sprietsma's common law tort claims against Mercury Marine. Sprietsma contends that there is a strong presumption against preemption here because federal preemption would displace state police powers that protect the health and safety of its citizens. Conversely, Mercury Marine argues that this case does not involve the historic police powers of the state but derives from federal maritime jurisdiction.

The United States Supreme Court has stated that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 146 L. Ed. 2d 69, 88, 120 S. Ct. 1135, 1147 (2000). However, an assumption of nonpreemption is triggered when the state regulates health and safety matters which have traditionally come within the jurisdiction of the state through its police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474, 135 L. Ed. 2d 700, 709, 116 S. Ct. 2240, 2245 (1996). We recognize that Sprietsma's claim that Mercury Marine designed a defective motor by failing to install a propeller guard relates to health and safety concerns. However, the claim also encompasses maritime activity, which is traditionally within the realm of federal regulation. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 61 L. Ed. 1086, 1098, 37 S. Ct. 524, 628 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country"); *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598, 607 (5th Cir. 2000).

Section 4301(a) states that the FBSA and its regulations apply "to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United

States and, for a vessel owned in the United States, on the high seas." 46 U.S.C. §4301(A) (1994). Furthermore, the FBSA's "[g]eneral jurisdictional applicability is to vessels within the historic federal maritime jurisdiction." S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1338. In deciding whether the claims in this case relate to federal maritime activity, we note that the United States Supreme Court has held that a collision between two pleasure boats on navigable waters had a sufficient nexus to traditional maritime activity to come within the admiralty jurisdiction of the federal courts. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674, 73 L. Ed. 2d 300, 306, 102 S. Ct. 2654, 2658 (1982). Thus, Sprietsma's claims bear upon an area historically regulated by the federal government. When "state laws *** bear upon national and international maritime commerce, *** there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108, 146 L. Ed. 2d at 88-89, 120 S. Ct. at 1148. Although Sprietsma's claims bear upon state and federal concerns, we believe the federal concerns predominate in this case. Therefore, in deciding whether Sprietsma's claims are preempted by the FBSA, we will not apply a presumption against preemption.

In addition, as we address the preemption issue, we will look to the decisions of the federal district and circuit courts. Although we have stated in the past that the decisions of federal courts interpreting a federal statute are controlling on Illinois courts (see *Busch v. Graphics Color Corp.*, 169 Ill. 2d 325, 335 (1996)), this overstates the degree of deference this court must pay to federal decisions. Thus, in *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 381 (1999), we elected to follow the precedent of the Seventh Circuit with regard to its interpretation of the Federal Employer's Liability Act (FELA) (45 U.S.C. §15

et seq. (1994)), because we found the Seventh Circuit analysis to be "reasonable and logical." More recently, however, we declined to follow Seventh Circuit precedent in a case involving a preemption issue under FELA when there was a split of authority among the federal circuits and we believed the Seventh Circuit case was wrongly decided. See *Weiland v. Tectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999).

Nevertheless, as we have repeatedly recognized, uniformity of decision is an important consideration when state courts interpret federal statutes. See *Weiland*, 188 Ill. 2d at 422; *Wilson*, 187 Ill. 2d at 383; *Busch*, 169 Ill. 2d at 335. Uniformity is particularly important where, as here, the federal statute relates to a product that is inherently mobile and thus likely to move from state to state. Indeed, this suit was brought to recover damages in an Illinois court, under Illinois law, for a death that took place in Tennessee. Boats also frequently navigate in lakes or rivers that mark the boundary between two states. Thus, it is essential that a uniform body of law be developed. In the absence of a decision of the United States Supreme Court, which would definitively answer the question presented by this case, we elect to give considerable weight to the decisions of federal courts of appeals and federal district courts that have addressed this issue.

C. Express Preemption

Keeping in mind the preceding preemption principles, we first address whether the FBSA expressly preempts Sprietsma's common law tort claims against Mercury Marine. Because Congress has demonstrated its intent to preempt some aspects of the state law under section 4306 (46 U.S.C. §4306 (1994)), we must determine the scope of preemption under that provision by focusing on its text. See *CSX Transportation, Inc.*

v. Easterwood, 507 U.S. 658, 664, 1223 L. Ed. 2d 387, 396, 113 S. Ct. 1732, 1737 (1993) ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent").

Section 4306 states:

> "Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. §4306 (1994).

Section 4306 preempts state laws or regulations that are not identical to the regulations promulgated under the FBSA. Although the FBSA does not define "law or regulation," the phrase clearly indicates an intent to include common law claims. *Cipollone*, 505 U.S. at 522, 120 L. Ed. 2d at 426, 112 S. Ct. at 2620 (state law includes common law as well as statutes and regulations); *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1501 (11th Cir. 1997) (language demonstrates intent to include common law claims); *Farner*, 239 Ill. App. 3d at 891. We also note that both state and federal courts have held that the preemption provision of the FBSA expressly preempts

common law tort claims. See, *e.g., Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 186 (E.D. Cal. 1996); *Shield v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D. Conn. 1993); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 891-92 (1992); *Ryan v. Brunswick Corp.*, 454 Mich. 20, 39, 557 N.W.2d 541, 551 (1997).

However, we must examine section 4306 in conjunction with the FBSA's savings clause provision of section 4311(g) (46 U.S.C. §4311(g) (1994)), which states: "[c]ompliance with this chapter or standards, regulations, or other prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. §4311(g) (1994). Although section 4306, the preemption provision, evinces Congress' intent to expressly preempt state laws or regulations not identical to those promulgated in the FBSA, this provision prevents us from finding express preemption.

The United States Supreme Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868, 146 L. Ed. 914, 923, 120 S. Ct. 1913, 1918 (2000), stated that the inclusion of a savings clause prohibits a broad reading of the express preemption provision. The Court noted that the presence of a savings clause "assumes that there are some significant number of common-law liability cases to save." *Geier*, 529 U.S. at 868, 146 L. Ed. 2d at 923, 120 S. Ct. at 1918. We agree that section 4311 limits section 4306. Consequently, we find no express preemption. See *Lady*, 228 F.3d at 611 (unable to conclude that section 4306 expressly preempted common law tort action); *Lewis*, 107 F.3d at 1502 (express terms of FBSA fail to show Congress' intent to preempt common law claims).

D. Implied Conflict Preemption

Although we find Sprietsma's action not to be expressly preempted by the FBSA, we are not prohibited from finding implied preemption. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, __, 148 L. Ed. 2d 854, 863-64, 121 S. Ct. 1012, 1019 (2001) ("[N]either an express pre-emption provision nor a savings clause 'bar[s] the ordinary working of conflict pre-emption principles'"), quoting *Geier*, 529 U.S. at 869, 146 L. Ed. 2d at 924, 120 S. Ct. at 1919; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 131 L. Ed. 2d 385, 393, 115 S. Ct. 1483, 1488 (1995) (the inclusion of an express preemption provision "does not mean that the express clause entirely forecloses any possibility of implied pre-emption").

The United States Supreme Court has found implied conflict preemption where it is "impossible for a private party to comply with both state and federal requirements" (*English*, 496 U.S. at 79, 110 L. Ed. 2d at 74, 110 S. Ct. at 2275), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67-68, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404 (1941); see also *Freightliner*, 514 U.S. at 287, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487). Since it is not impossible for a manufacturer to comply with a state common law rule requiring propeller guards and the Coast Guard's decision not to require them, we will address whether a state common law tort claim based on failure to install the guards stands as an obstacle to the accomplishment of the purposes and objectives Congress sought to achieve enacting the FBSA.

Initially, Sprietsma maintains that the Supreme Court's decision in *Freightliner* precludes a finding of implied preemption in this case. In *Freightliner*, the Supreme Court

considered whether common law claims based on the failure to install antilock brakes on 18-wheel tractor-trailers were expressly or impliedly preempted by the preemption clause of the Vehicle Safety Act. *Freightliner*, 514 U.S. at 282, 131 L. Ed. 2d at 389, 115 S. Ct. at 1485. The defendant tractor-trailer manufacturers argued that the failure-to-install claims were preempted because the National Highway Traffic Safety Administration (NHTSA) had indicated its intent to regulate braking systems by issuing a regulation on the matter. *Freightliner*, 514 U.S. at 284-86, 131 L. Ed. 2d at 390-91, 115 S. Ct. at 1486-87. That regulation was struck down by the Court of Appeals for the Ninth Circuit, but the defendant manufacturers argued it still had preemptive effect because it showed the NHTSA's intent to forbid state regulation of breaking systems. *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 391-92, 115 S. Ct. at 1487.

The Supreme Court rejected the manufacturers' argument, stating that there was no federal standard on stopping distances or vehicle stability for trucks or trailers, and there was "no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances an vehicle stability." *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. The Court stated that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes." *Freightliner*, 514 U.S. at 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. Thus, states could implement safety standards and, without any federal standards, a liability claim would not be in conflict with or frustrate the objectives of Congress. *Freightliner*, 514 U.S. at 289, 131 L. Ed. 2d at 394, 115 S. Ct. at 1488.

In contrast to *Freightliner*, where the lack of federal

regulation was not the result of an affirmative decision not to regulate, here, the Coast Guard did make an affirmative decision to refrain from promulgating a propeller guard requirement. See *Lady*, 228 F.3d at 612 ("the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate"); *Lewis*, 107 F.3d at 1504 ("[w]hile an absence of regulation under the Vehicle Safety Act does not prevent states from regulating motor vehicle safety standards, an absence of federal regulation under the FBSA means that no regulation, state or federal, is appropriate[;] *Freightliner* is distinguishable for that reason"). As we agree with the federal decisions in *Lady* and *Lewis*, the ruling in *Freightliner* does not preclude a finding of implied preemption in this case.

In *Geier*, the Supreme Court determined whether Federal Motor Vehicle Safety Standard 208 (Safety Standard 208) preempted a common law tort action based on the failure to install a driver's side airbag. The Department of Transportation stated that the purpose of Safety Standard 208 was to provide auto manufacturers with a choice of whether or not to install airbags with a gradual phase-in of passive restraint devices. *Geier*, 529 U.S. at 878-79, 146 L. Ed. 2d at 930, 120 S. Ct. at 1924. Under an implied conflict preemption analysis, the Court stated that Geier's tort action depended upon her claim that auto manufacturers had a duty to install an airbag in her car when it was made. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 931-32, 120 S. Ct. at 1925. This alleged duty would have required other auto manufacturers to install airbags in similar cars rather than other safety restraint systems, such as automatic seatbelts or passive interiors. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. This claim "would have presented an obstacle to the variety and mix of devices that the

federal regulation sought *** [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed." *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925. The Court thus concluded that Safety Standard 208 preempted Geier's tort claim because of the obstacle it presented to the accomplishment of federal objectives. *Geier*, 529 U.S. at 881, 146 L. Ed. 2d at 932, 120 S. Ct. at 1925

Mercury Marine maintains that we should apply *Geier*'s ruling that Safety Standard 208 preempted conflicting state laws to this case in order to preempt Sprietsma's tort claim. Sprietsma, on the other hand, argues that there is no regulation by the Coast Guard with which his claim could conflict, only a decision not to prescribe a standard. According to Sprietsma, the absence of a regulation does not in itself constitute a regulation. See *Freightliner*, 514 U.S. 286, 131 L. Ed. 2d at 392, 115 S. Ct. at 1487. However, the Supreme Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." (Emphases omitted.) *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384, 76 L. Ed. 2d 1, 10, 103 S. Ct. 1905, 1912 (1983); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 414, 151-52, 103 L. Ed. 2d 118, 135, 109 S. Ct. 971, 978 (1989). The Supreme Court has also concluded that "'where [the] failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004-05 (1978), quoting *Bethlehem*

Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 774, 91 L. Ed. 1234, 1246, 67 S. Ct. 1026, 1030 (1947).

In determining whether the Coast Guard's failure to promulgate a propeller guard requirement compels the conclusion that no such regulation is appropriate, we find helpful the Supreme Court's decision in *Ray*. In that case, the Supreme Court considered whether federal law preempted the State of Washington's enactment of a law regulating standard safety features and weight of oil tankers navigating Puget Sound. The Washington "Tanker Law" sought to exclude tankers in excess of 125,000 DWT (dead weight tons) from Puget Sound. *Ray*, 435 U.S. at 173, 55 L. Ed. 2d at 198, 98 S. Ct. at 1002. Shipbuilders alleged these requirements were preempted by section 1222(b) of the federal Ports and Waterways Safety Act (PWSA) which prohibited states from imposing higher safety standards than those prescribed by the Transportation Secretary. The Court stated that enforcement of the state's design requirements "would at least frustrate *** the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." *Ray*, 435 U.S. at 165, 55 L. Ed. 2d at 193, 98 S. Ct. at 998.

The Court then looked at the PWSA and the state's exclusion of vessels in excess of 125,000 DWT. *Ray*, 435 U.S. at 173, 55 L. Ed. 2d at 198, 98 S. Ct. at 1002. The Court found that section 1222(b) of the PWSA was intended to have a preemptive impact. Further, even without section 1222(b), it would be reluctant to uphold the Tanker Law's absolute ban on tankers in excess of 125,000 DWT. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004. The Court based this conclusion on the Coast Guard's vessel traffic control system of Rosario Strait. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004-05. The Transportation Secretary, through the

Coast Guard, promulgated the "Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in the Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification of precautionary areas and reporting points." *Ray*, 435 U.S. at 170, 55 L. Ed. 2d at 196, 98 S. Ct. at 1001. A local Coast Guard rule prohibited the passage of more than one 70,000 DWT vessel in Rosario Strait in either direction at a given time, and in bad weather, the restriction was reduced to 40,000 DWT. *Ray*, 435 U.S. at 171, 55 L. Ed. 2d at 197, 98 S. Ct. at 1001.

The Court stated the question then was whether the Transportation Secretary, through the Coast Guard, had addressed the size limitation question. *Ray*, 435 U.S. at 174, 55 L. Ed. 2d at 199, 98 S. Ct. at 1003. Because of the navigation rules pertaining to the Rosario Strait, the Court held that the Secretary's failure to promulgate a ban on the operations of oil tankers in excess of 125,000 DWT took on the character of a ruling that no such regulation is appropriate pursuant to the policy of the PWSA. *Ray*, 435 U.S. at 178, 55 L. Ed. 2d at 201, 98 S. Ct. at 1004-05.

The Supreme Court reaffirmed the framework and holding of *Ray* in *Locke*, 529 U.S. at 103-04, 146 L. Ed. 2d at 85-86, 120 S. Ct. at 1145. There, the Court stated that "*Ray* defined the relevant inquiry for *** pre-emption as whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all." *Locke*, 529 U.S. at 110, 146 L. Ed. 2d at 89, 120 S. Ct. at 1148.

We believe that the Coast Guard's failure to promulgate

a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA. See *Lady*, 228 F.3d at 614 (damage award "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufactures flexibility in the matter"); *Lewis*, 107 F.3d at 1505 (plaintiffs' "product liability claims seek to impose a propeller guard requirement"). Thus, Sprietsma's claim would present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA.

We stated earlier that in an effort to give uniform application to the FBSA, we would give great weight to federal decisions on this matter. In that regard, we note that several federal district courts and courts of appeals have found preemption, express or implied, in similar propeller guard cases. See, *e.g., Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shields v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Mowery v. Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991).

The Fifth Circuit Court of Appeals in *Lady* dealt with a jet ski operator who was severely injured by the propeller blades of a boat with which he had collided. *Lady*, 228 F.3d at 600. The court of appeals held that the operator's claims, based on the manufacturer's failure to install propeller guards on its boat, were impliedly preempted by the FBSA. *Lady*, 228 F.3d at 615. The Eleventh Circuit Court of Appeals in *Lewis* dealt with a passenger on a boat who was killed after she fell in the water and was struck by the propeller blades. *Lewis*, 107 F.3d at 1497. The court of appeals held that her parents' claims, based on the engine's being defective because it lacked a propeller guard, were impliedly preempted because they conflicted "with the regulatory uniformity purpose of the FBSA." *Lewis*, 107 F.3d at 1506.

On appeal to the United States Supreme Court, the Solicitor General in *Lewis* argued that the Coast Guard's failure to issue a regulation concerning propeller guards was not a basis for implied conflict preemption of common law tort claims.[1] Sprietsma argues that this court should adhere to the argument presented by the Solicitor General, arguing reversal in *Lewis*. In support of this contention, Sprietsma points out that in *Geier*, the Supreme Court placed "some weight upon DOT's [Department of Transportation's] interpretation of [Safety Standard] 208's objectives and its conclusion, as set forth in the Government's brief." *Geier*, 529 U.S. at 883, 146 L. Ed. 2d at 933, 120 S. Ct. at 1926. The Court concluded that

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[1] A petition for *certiorari* was granted in *Lewis v. Brunswick Corp.*, 522 U.S. 978, 139 L. Ed. 2d 337, 118 S. Ct. 439 (1997), but after oral argument and before a decision was issued, the parties settled and the petition for *certiorari* was dismissed (*Lewis v. Brunswick Corp.*, 523 U.S. 1113, 140 L. Ed. 2d 933, 118 S. Ct. 1793 (1998)).

it had "no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than 'the agency's fair and considered judgment on the matter.'" *Geier*, 529 U.S. at 884, 146 L. Ed. 2d at 933, 120 S. Ct. at 1927, quoting *Auer v. Robbins*, 519 U.S. 452, 462, 137 L. Ed. 2d 79, 91, 117 S. Ct. 905, 912 (1997). We do not believe that Sprietsma's reliance on the United States' position in *Lewis* warrants our deference on the matter.

First, the Solicitor General has not presented his argument concerning the *Lewis* case or the Sprietsma claim to this court. See *Lady*, 228 F.3d at 615 n.23 (absent his appearance, Solicitor General's views on the matter not before the court). Second, the Court in *Geier* stated that it would place "some weight" on the DOT's interpretation. *Geier*, 529 U.S. at 883, 146 L. Ed. 2d at 933, 120 S. Ct. 1926. Thus, even if we were to consider the Solicitor General's argument in *Lewis*, we do not believe the weight given to it would overcome the application of our implied preemption analysis. See *Lady*, 228 F.3d at 615 n.23. Third, arguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicit General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869, 146 L. Ed. 2d at 924, 120 S. Ct. at 1919.

In considering the federal decisions on this matter, we find the Fifth Circuit's opinion in *Lady* persuasive and agree that: "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that

it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Lady*, 228 F.3d at 615.

Furthermore, we are not persuaded by the two state court decisions that have held that federal law does not preempt state law in this type of case. See *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994); *Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999). As these cases represent the minority view on this matter, we believe a finding of preemption was warranted here in order to continue the line of uniformity laid down by the federal courts that have found preemption under the FBSA. Therefore, based on the preceding analysis, we find that Sprietsma's common law tort claims are impliedly preempted by the FBSA.

As a final note, Mercury Marine filed a motion to strike the first five pages of Sprietsma's reply brief insofar as it argued that the preemption defense was unavailable because the boat motor was manufactured in 1988, more than a year before the Coast Guard's 1990 decision not to take regulatory action. Sprietsma's argument was never addressed or ruled upon by the circuit or appellate courts. Also, Sprietsma did not raise the argument in his brief to this court but raised it for the first time in his reply brief. Under Supreme Court Rule 341(e)(7), points not argued in the appellant's brief are waived and shall not be raised in the reply brief. 177 Ill.2d R. 341(e)(7). Therefore, this argument is waived. Mercury Marine's motion to strike portions of Sprietsma's reply brief, which was taken with the case, is allowed.

For the foregoing reasons, we affirm the appellate court's judgment that the FBSA preempts Sprietsma's common

law claims for failure to install propeller guards.

Affirmed.

JUSTICE THOMAS took no part in the consideration or decision of this case.

CHIEF JUSTICE HARRISON, dissenting:

Under the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), state law must yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a lower federal court's interpretation. A state court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located. The only federal court whose interpretation of federal law is binding on the courts of Illinois is the United States Supreme Court. If the courts of this state follow a lower federal court's interpretation of federal law, they do so only because they choose to, not because they must. *Lockhart v. Fretwell*, 506 U.S. 364, 376, 122 L. Ed. 2d 180, 193, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring).

Notwithstanding the view expressed by former Justice Bilandic in his opinion in *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335 (1996), the most recent decisions of our court have adhered to this view. In the absence of controlling United States Supreme Court precedent, we may "elect" to follow Seventh Circuit precedent construing a federal statute. *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 383-84 (1999). We are not required to do so, however, and are free to depart from that precedent whenever we believe it is wrongly decided. *Weiland v. Telectronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 423 (1999). See also *People v. Kokoraleis*, 132 Ill. 2d 235,

293-94 (1989) ("decisions of lower Federal courts are not conclusive on State courts, except insofar as the decision of the lower Federal court may become the law of the case").

Contrary to my colleagues' view, this is not a case where our authority to make an independent interpretation of federal law should yield to considerations of uniformity. If our view of federal law differs from that of the lower federal courts and the conflict proves problematic, the United States Supreme Court may grant review to resolve the conflict. We should not perpetuate an erroneous interpretation of the law merely because it has been endorsed by some lower federal court judges. Uniformity is no virtue if it means being uniformly wrong.

I also disagree with the result the majority reaches on the merits. My colleagues go to enormous lengths to uphold a finding of preemption when they should be doing exactly the opposite. Preemption is disfavored. As our court has previously held, a presumption exists in every preemption case that Congress did *not* intend to supplant state law. *Scholtens v. Schneider*, 173 Ill. 2d 375, 379 (1996).

In ascertaining congressional intent, our inquiry necessarily begins with an analysis of the language of the statute. *Scholtens*, 173 Ill. 2d at 380. The language employed by Congress here could not be more clear. Section 4311(g) of the FBSA expressly provides:

> "[C]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. §4311(g) (1994).

If we are to give this provision its plain and ordinary meaning, as we must, Mercury Marine's compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by Sprietsma in this case. Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly.

The Supreme Court of Texas (*Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)) and the Missouri Court of Appeals (*Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999)) have reached the same conclusion on similar facts: the FBSA does not preempt common law tort claims based on failure to install propeller guards. Although our appellate court took a contrary position in *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885 (1992), that case is premised on a narrow construction of section 4311, which cannot be justified given the broad language Congress employed when it drafted the statute. See *Ard*, 996 S.W.2d at 600. *Farner* should be overruled.

While allowing common law tort claims to go forward may seem to create a tension in the Coast Guard's policy against propeller guards, that is a circumstance we must assume Congress considered when it adopted section 4311(g). If section 4311(g) ultimately proves unworkable when applied as written, that is a matter for Congress and not this court to remedy.

For the foregoing reasons, the judgment of the appellate court affirming the dismissal of plaintiff's complaint should be reversed, and the cause should be remanded to the circuit court for further proceedings. I therefore dissent.

FOURTH DIVISION
APRIL 6, 2000

No. 1-99-0012

REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, Deceased,

Plaintiff-Appellant,

v.

MERCURY MARINE, a Division of BRUNSWICK CORPORATION, a corporation,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County.

The Honorable Joseph N. Casciato, Judge, Presiding.

JUSTICE BARTH delivered the opinion of the court:

The plaintiff, Rex Sprietsma, as administrator of the estate of his deceased wife, Jeanne, filed this wrongful death action against *inter alia*, Mercury Marine, a division of Brunswick Corporation (Mercury), for the benefit of himself, the surviving spouse, and his son, Ross. Jeanne died after falling from a motor boat and being struck by the propeller blades of the boat's outboard engine. That engine was not equipped with a propeller guard.

Mercury moved to dismiss pursuant to section 2-619 (735 ILCS 5/2-619 (West 1998)), on the ground that the

common law tort claims on which Sprietsma's wrongful death action is based are preempted by provisions of the Federal Boat Safety Act (FBSA or Act) (46 U.S.C. § 4301 *et seq*. (1971)). The trial court granted the motion, this appeal followed, and we now affirm.

Background

a. Facts of this case

In July of 1995, plaintiff's decedent, Jeanne Sprietsma, was a passenger on board a motor boat. While the driver was in the process of making a right turn, Jeanne fell from the boat. Once in the water, she was repeatedly struck by the propeller blades of the boat's outboard engine. This caused her to suffer serious injury and resulted in her death shortly thereafter. The engine, designed by Mercury, was not equipped with a propeller guard.

Sprietsma filed a wrongful death action against, *inter alia*, Mercury to recover damages for the personal injuries of Jeanne, and for the loss of consortium suffered by both himself and his son Ross. Sprietsma's complaint alleged that Mercury's engine was defectively designed in that it was not equipped with propeller guards. Mercury moved for dismissal pursuant to section 2-619 (735 ILCS 5/2-619 (West 1998)) on the ground that Sprietsma's claims were preempted by the FBSA.

Finding that Sprietsma's cause of action was impliedly preempted by the FBSA, the trial court granted Mercury's motion to dismiss on November 20, 1998. The court included language in its order that it was final and appealable pursuant to Illinois Supreme Court Rule 304(a).

On appeal, Sprietsma contends that the trial court erred in granting dismissal, since the FBSA does not expressly or impliedly preempt state law tort claims based on the absence of a propeller guard. In support of his contention, Sprietsma asserts: (1) if Congress had intended to preempt common law claims, it would have explicitly done so in the FBSA's preemption clause; (2) even if the Act's preemption language ordinarily includes common law claims, the Act's savings clause alters this conclusion; (3) this court is required to apply a presumption against finding preemption; and (4) claims relating to propeller guards cannot be in conflict with federal law where there is no federal law on the subject.

b. The Federal Boat Safety Act

At issue is the construction of sections 4306 and 4311(g) of the FBSA, otherwise known as the preemption and savings clauses respectively. Section 4306 provides:

> "Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

And section 4311(g) provides:

> "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The FBSA was enacted in 1971 in part to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of Transportation." See P.L. 92-75, Federal Boat Safety Act of 1971, S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.A.N. 1333. To implement that goal, the Act grants the Secretary the exclusive authority to prescribe regulations establishing minimum safety standards for recreational boats. See 46 U.S.C. § 4302. To facilitate this duty, the Secretary has the option to delegate regulatory functions to a designated agency that operates under [his or her] supervision. See 46 U.S.C. § 4303(a). The United States Coast Guard has been designated as that agency. See 49 C.F.R. § 1.46(n)(1) (1996).

Pursuant to the Act, the Coast Guard must consult with the National Boating Safety Advisory Council (NBSAC) concerning the need for regulation in a given area and the extent to which proposed regulations will contribute to recreational boating safety. See 46 U.S.C. § 13110.

iii. Regulating the use of propeller guards

In 1988, the Coast Guard directed the NBSAC to examine the feasibility and potential safety advantages and disadvantages of propeller guards. The NBSAC appointed a

Propeller Guard Subcommittee for the purpose of reviewing and analyzing data relating to recreational boating accidents in which persons in the water were struck by boat propellers. See National Boating Safety Advisory Council, Report of the Propeller Guard Subcommittee (1989). The NBSAC also asked the Subcommittee to consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard." See Report of the Propeller Guard Subcommittee, at Appendix A.

After a year-long study and three different public hearings on the matter, the Subcommittee reached the unanimous conclusion that the "U.S. Coast Guard should take no regulatory action to require propeller guards." See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 24. The Subcommittee determined that "[t]he development and use of devices such as 'propeller guards' can *** be counterproductive and can create new hazards of equal or greater consequence." See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 23. Among other negative effects, propeller guards were found to have the potential to decrease an operator's ability to maintain control over the boat at "normal" speeds, increase the probability of striking an body in the water, and create a possibility of causing greater injury to those struck. See Report of the Propeller Guard Subcommittee, Nov. 7, 1989, at 23-24.

The Subcommittee's recommendation that no regulatory action be taken was accepted by both the NBSAC and the Coast Guard. See Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990).

Analysis

We review *de novo* the grant of a motion brought pursuant to 2-619. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 116, 619 N.E.2d 732 (1993). The Supremacy Clause of the Constitution provides that "the laws of the United States . . . shall be the supreme Law of the Land *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to preempt state law. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 90 L. Ed. 2d 369, 381, 106 S. Ct. 1890, 1898 (1986). "In determining whether Congress has preempted state law, our task is to discern congressional intent." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381-82, 119 L. Ed. 2d 157, 167, 112 S. Ct. 2031, 2036 (1992). A court interpreting a federal statute pertaining to a subject traditionally governed by state law (such as safety) will be reluctant to find preemption. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663-64, 123 L. Ed. 2d 387, 396, 113 S. Ct. 1732, 1737 (1993); *Weiland v. Teletronics Pacing Systems, Inc.*, 188 Ill. 2d 415, 416, 721 N.E.2d 1149 (1999). In fact, preemption will be found only in those situations where it is "the clear and manifest purpose of Congress." *CSX*, 507 U.S. at 664, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152 (1947). Federal preemption of state law can occur in three circumstances: (1) express preemption, where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption, where there has been an actual conflict between federal and state law (conflict preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74-75, 110 S. Ct. 2270, 2275 (1990).

Preliminarily, we note that the second district of this court has considered the precise issue with which we are now presented in *Farner v. Brunswick Corp.*, 239 Ill. App. 2d 885, 607 N.E.2d 562 (1992). As in the case *sub judice*, the plaintiff in *Farner* filed suit after being injured by a propeller on a boat motor designed and manufactured by the defendant. *Farner*, 2239 Ill. App. 3d at 887. The trial court granted summary judgment in favor of the defendant manufacturer, finding that the FBSA preempted "plaintiff's claims insofar as they [were] based on a failure to provide a propeller guard." *Farner*, 239 Ill. App. 3d at 887. The second district affirmed, finding that the language of the Act expressly prohibited a common law damage action for failure to provide a propeller guard where the United States Coast Guard has made the decision not to require them. *Farner*, 239 Ill. App. 3d at 892-93.

Next, we acknowledge the well-settled proposition in Illinois that decisions of the federal courts interpreting a federal act, such as the FBSA, are controlling upon our state courts, "in order that the act be given uniform application." *See Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 383, 718 N.E.2d 172 (1999); *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335, 662 N.E.2d 397 (1996); *Boyer v. Atchison, Topeka & Santa Fe Ry. Co.*, 38 Ill. 2d 31, 34, 230 N.E.2d 173 (1967). But see *Weiland*, 188 Ill. 2d at 423 (Illinois Supreme Court not bound by Seventh Circuit's interpretation of federal statute where the U.S. Supreme Court has not ruled on the question presented, there is a split of authority among the federal circuit courts of appeals, and court believes the case from the Seventh Circuit was wrongly decided).

I. Federal cases interpreting the FBSA

In *Carstensen v. Brunswick Corp.*, 49 F.3d 430 (8th Cir.

1995), the Eighth Circuit Court of Appeals considered the preemptive scope of the FBSA on facts similar to those before this court. There, the plaintiff was a boat passenger who sustained injury when she fell from the boat and was struck by the engine's propeller. *Carstensen*, 49 F.3d at 430. She filed suit, alleging that the boat's manufacturer was negligent for having failed to install a propeller guard. *Carstensen*, 49 F.3d at 430. The Eighth Circuit held that the plaintiff's claims were expressly preempted by the language of the FBSA's preemption clause, section 4306. *Carstensen*, 49 F.3d at 431. That clause provides, in relevant part:

> "[a] State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment safety standard or imposing a requirement for such equipment *** that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306.

Like Sprietsma, the plaintiff in *Carstensen* contended that the language of the FBSA's preemption clause fails to make explicit mention of common law actions, and thus Congress must not have intended to preempt them. The court responded by stating that while the language of the Act's preemption clause does not specifically refer to common law actions, it is very broad. *Carstensen*, 49 F.3d at 431-32. Such broad language, the court explained, "does not admit of [a] distinction between positive enactments and common law." *Carstensen*, 49 F.3d at 432 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522, 120 L. Ed. 2d 407, 426, 112 S. Ct. 2608, 2620 (1992)). Accordingly, the court concluded, the language used by Congress expressly indicates an intent to preempt all state laws or regulations that are not identical to a

regulation promulgated under the Act. *Carstensen*, 49 F.3d at 431. The Act does not contain a propeller guard regulation or requirement, and thus, by the explicit language of the preemption clause, states are forbidden from establishing one. This must mean, the court concluded, that common law damage actions are likewise forbidden since "[a]llowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed." *Carstensen*, 49 F.3d at 432. *See generally Cipollone*, 505 U.S. at 621 ("[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief"); and *Medtronic Inc. v. Lohr*, 518 U.S. 470, 509, 135 L. Ed. 2d 700, 730, 116 S. Ct. 2240, 2262 (1996) ("state common law damages actions do impose requirements and are therefore preempted where such requirements would differ from those imposed by [statute]") (O'Connor, J., concurring in part and dissenting in part).

As does Sprietsma here, the plaintiff in *Carstensen* pointed to the Act's savings clause, section 4311(g), arguing that its language alters the above analysis. The Act's savings clause provides:

> "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

Considering this argument, the court first looked to the legislative history of the savings clause and noted that its stated purpose "is to assure that in a product liability suit, mere compliance by a manufacturer with the Act will not be complete defense to liability." *Carstensen*, 49 F.3d at 432

(quoting S. Rep. No. 248 92nd Cong. 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1333, 1352). The stated purpose of 4311(g), the court explained, offers guidance as to how to harmonize or balance the language of the preemption clause, which forbids states from imposing requirements not identical to those in the Act, with that of the savings clause, which appears to preserve at least some common law claims, but cannot be read to preserve those that would conflict with other sections of the Act. *Carstensen,* 49 F.3d at 432. The balance the court struck was not to interpret the savings clause as preserving common law claims for defectively designed products that are actually installed. *Carstensen,* 49 F.3d at 432.

Thus, for example, since the Act does not require that propeller guards be installed at all, there can be no cause of action against the manufacturer for failing to install them. However, since the Act does not prohibit manufacturers from installing propeller guards, those manufacturers who choose to install them would not be permitted to use compliance with the Act as a *per se* defense to claims that those guards are defective. *Carstensen,* 49 F.3d at 432. We note that several other courts which have interpreted the FBSA have reached an identical conclusion. *See, e.g., Moss v. Outboard Marine Corp.*, 915 F.Supp. 183, 187 (E.D.Cal. 1996) (FBSA savings clause has no application where manufacturer chooses not to install a propeller guard); *Shields v. Outboard Marine Corp.*, 76 [sic] F.Supp. 1579, 1581-82 (M.D.Ga. 1991) (same); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D.Ohio 1991) (boat manufacturer not liable for failure to install device it had a choice not to install, but analysis would look different if manufacturer chose to install defective product); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 892 (2nd Dist. 1992) (same). See also *Mulhern v. Outboard Marine Corp.*, 146 Wis. 2d 604, 617 (Ct. App. 1988) (claims based on defective seat not

preempted by FBSA) and *Rubin v. Brutus Corp.*, 487 So.2d 360, 365 (Fla.Dist.Ct.App. 1986) (claims based on defective throttle not preempted).

Two years after the decision in *Carstensen*, the Eleventh Circuit Court of Appeals considered FBSA preemption of common law claims in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (1997). In *Lewis*, the parents of a woman who died after she was thrown from a boat and struck by its propeller brought suit against the manufacturer of the engine. *Lewis*, 107 F.3d at 1494. As in the instant case, the plaintiffs in *Lewis* alleged that the boat's engine was defective due to its lack of propeller guards. *Lewis*, 107 F.2d [sic] at 1494. The district court granted the defendant manufacturer's motion for summary judgment, finding that the plaintiff's claims were preempted by the FBSA, and the Eleventh Circuit affirmed. *Lewis*, 107 F.3d at 1494.

The *Lewis* court achieved the same result as *Carstensen*, i.e. dismissal of the common law claim, but its analysis differed. While *Carstensen* holds that common law claims are expressly preempted, the Eleventh Circuit based its finding of preemption on an implied rather than express preemption theory. *Lewis*, 197 F.3d at 1503. The court characterized its implied preemption analysis as a determination whether plaintiffs' claims "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and concluded that they did. *Lewis*, 107 F.3d at 1501 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995)).

We find the discussion in the *Lewis* opinion regarding the nature of FBSA preemption to be well-reasoned, but we nevertheless accept as determinative the Eighth Circuit's

analysis in *Carstensen*, and therefore hold that the FBSA expressly preempts common law claims for failure to install propeller guards. We note that a decided majority of the courts to have considered our issue have found express preemption. See e.g., *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 892 (2nd Dist. 1992) (section 4306 interpreted as a "specific expression of congressional intent to preempt a common law tort action); *Ryan v. Brunswick Corporation*, 557 N.W.2d 241 [sic], 551 (Mich. 1997) ("we join a long line of cases that have similarly held that common law *** actions alleging liability for failure to incorporate a propeller guard *** are expressly preempted under the FBSA"). Accord, *Moss v. Outboard Marine Corp.*, 915 F.Supp. 613, 615 (E.D.Cal. 1996); *Shields v. Outboard Marine Corp.*, 776 F.Supp. 1579, 1581, (M.D.Ga. 1991); *Shields v. Bayliner Marine Corp.*, 822 F.Supp. 81, 84 (D.Conn. 1993); *Mowery v. Mercury Marine*, 773 F.Supp. 1012, 1017 (N.D. Ohio 1991).

II. FBSA preemption in light of
U.S. Supreme Court decisions

Because we hold that the FBSA expressly and explicitly preempts Sprietsma's claims, we do not consider whether implied preemption exists.[1] See *Cipollone*, 505 U.S. at 518 (when Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation).

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[1] Although the trial court found implied preemption, we are not bound by that conclusion, and may sustain the judgment on any ground warranted by the record. *People ex rel. Waller v. 1990 Ford Bronco*, 158 Ill. 2d 460, 463 (1994).

Although two federal circuits have construed the FBSA, the U.S. Supreme Court has not yet had occasion to do so.[2] Sprietsma directs this court's attention to *Freightliner Corp. v. Myrick*, 514 U.S. 280, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), in which the Court construed the Vehicle Safety Act, 15 U.S.C.A. § 1381 *et seq.*, a similar, through [sic] by no means analogous statute. Sprietsma argues that the holding in *Myrick* prevents this court from finding preemption in the absence of a promulgated regulation with respect to propeller guards. Furthermore, according to Sprietsma, *Myrick* establishes a "stricter" preemption analysis, under which this court must find that his claims are not preempted. See *Moore v. Brunswick Bowling & Billiards*, 889 S.W.2d 246, 252 (Tex 1994) (finding early decisions construing the FBSA unpersuasive in light of the decision in *Myrick*).

Having carefully considered *Myrick*, we find that the facts and reasons in that case do not preclude a finding of preemption in this case, and in fact, support the determination that Sprietsma's state common law claims are preempted. See *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 296 (7th Cir. 1997) (holding plaintiff's product liability claims against windshield retention system manufacturer were preempted by the Vehicle Safety Act, and finding that *Myrick* supported this conclusion).

In *Myrick*, the Supreme Court considered whether common law claims based on the failure to install antilock

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[2] A petition for certiorari was granted in *Lewis* (522 U.S. 978, 139 L. Ed. 2d 337, 118 S. Ct. 439 (1997)) but we were informed by counsel at oral argument that the appeal was dismissed by agreement of the parties (523 U.S. 1113, 140 L. Ed. 2d 933, 118 S. Ct. 1793 (1998)).

brakes were expressly or impliedly preempted by the Vehicle Safety Act. *Myrick*, 514 U.S. at 282. The preemption clause in that act provided:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard application to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard." 15 U.S.C.A. § 1392(d) (1982).

The plaintiffs in *Myrick* sued two different motor vehicle manufacturers, alleging that the absence of an antilock braking system in their tractor trailers constituted a negligent design defect. *Myrick*, 514 U.S. at 282. The defendant manufacturers responded that failure to install claims were preempted because the relevant agency had indicated its intent to regulate braking systems by promulgating a regulation on that subject. *Myrick*, 514 U.S. at 286. Although that regulation was subsequently struck down by the Ninth Circuit, the defendants argued it still had preemptive effect, since it demonstrated the agency's intent to forbid state regulation with regard to braking systems. *Myrick*, 514 U.S. at 286. The Supreme Court rejected the defendants' argument.

The Court pointed out that there was no evidence that the Vehicle Safety Act gave the relevant federal agency exclusive authority to issue safety standards. *Myrick*, 514 U.S. at 286. In fact, the Court explained that the preemption clause

in that act clearly implied that states could impose safety standards on auto manufacturers until the federal government came forth with a different standard. Therefore, under the Vehicle Safety Act regulatory scheme, the absence of regulation failed to have preemptive effect since, if there was no federal regulation on point, state law remained intact. *Myrick*, 514 U.S. at 286. Moreover, the Court pointed out, this was not a situation which the relevant agency had reached an authoritative decision not to regulate. *Myrick*, 514 U.S. at 286-87. Rather, the agency determined that a regulation was appropriate and even promulgated one, which was simply not in effect at the time of the lawsuit. *Myrick*, 514 U.S. at 287.

In contrast to section 1392(d) of the Vehicle Safety Act, section 4306 of the FBSA does not grant states the authority to regulate where the federal government does not. In fact, the language of the FBSA explicitly provides that states are forbidden from regulating *at all* unless there is an identical federal regulation. See 43 U.S.C. § 4306 (emphasis added). In this case, the agency granted rulemaking authority, the Coast Guard, investigated the possibility of promulgating a propeller guard regulation, and concluded that no such regulation was warranted. Accordingly, no such regulation was promulgated. The Supreme Court has held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-52, 103 L. Ed. 2d 118, 135, 109 S. Ct. 971, 977-78 (1989). See also *Myrick*, 514 U.S. at 286-88 (acknowledging that this is especially true where congress intended to centralize all authority over the regulated area in one decisionmaker: the federal government).

Finally, we note that out of the thirteen courts that have considered FBSA preemption of common law claims based on lack of propeller guard, only two have ruled that the Act does not preempt such claims. See *Moore v. Brunswick Bowling & Billiards*, 889 S.W.2d 246 (Tex. 1994) and *Ard v. Jensen*, 996 S.W.2d 594 (Mo.Ct.App. 1999). We do not find those two state court pronouncements persuasive, particularly in light of the U.S. Supreme Court's holding in *Myrick*. Furthermore, we see in those opinions no basis for a departure from the decisions of every federal court to have considered the issue, or from this court's holding in *Farner*.

We are mindful of the presumption against a finding of federal preemption where the matter is one traditionally governed by state law, such as safety. However, in this case, we determine that the presumption has been overcome by the uniformity of the federal court decisions construing the FBSA. There is as yet no definitive ruling on the scope of preemption of state common law claims under the FBSA by the Supreme Court. That being the case, we believe our holding is buttressed by the inferences to be drawn from the Court's recent preemption analyses in *Myrick* and *Medtronic* as discussed above.

Conclusion

For the reasons stated herein, the trial court's order which dismissed Sprietsma's complaint as to Mercury is affirmed.

Affirmed.

HOFFMAN, P.J., and SOUTH, J., concur.

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

REX R. SPRIETSMA, Administrator
of the Estate of JEANNE SPRIETSMA,

v. No. 96-L 07812

MERCURY MARINE, a Division of
BRUNSWICK CORPORATION, et al.

ORDER

This case coming to be heard on the hearing of defendant Mercury Marine's Motion to Dismiss pursuant to 735 ILCS 5/2-619, due notice given; the Court being fully advised in the premises. It is hereby ordered that:

1. Attorney Daniel J. Connolly is admitted pro hac vice for purposes of this Motion;

2. Defendant Mercury Marine's Motion to Dismiss is granted;

3. Plaintiff's Motion For Rule 304(a) language is granted and the Court expressly finds that there is no just reason for delaying either the enforcement of or appeal of this order.

s/
Judge Joseph N. Casciato

November 20, 1998

February 1, 1990

Department of Transportation
United States Coast Guard

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in

recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of college students to gather

hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making

organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our National Nonprofit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position: Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address

this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

s/

ROBERT T. NELSON
Rear Admiral, U. S. Coast Guard
Chief, Office of Navigation Safety
and Waterway Services

Supreme Court, U.S.
FILED
DEC 20 2001
OFFICE OF THE CLERK

No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED, PETITIONER

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Illinois Supreme Court correctly applied this Court's preemption precedents, including *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), and *United States* v. *Locke*, U.S. 89 (2000), in holding that the Federal Boat Safety Act preempts common law claims asserting that recreational boat motors must be equipped with "propeller guards," where the Coast Guard expressly rejected such a requirement after extensive administrative proceedings.

RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma, deceased.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1-22) is reported at 757 N.E.2d 75 (Ill. 2001). The opinion of the Illinois Appellate Court (Pet. App. 23-38) is reported at 729 N.E.2d 45 (Ill. App. 2000). The order of the Circuit Court of Cook County (Nov. 20, 1998) (Pet. App. 39) is unreported.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. As explained below, however, there is a question about the Court's jurisdiction in this case. See *infra* pp. 29-30.

STATEMENT OF THE CASE

The petition rests almost entirely on the claim that this Court should resolve the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which was dismissed before a decision on the merits. 523 U.S. 1113 (1998). But the principal legal issues raised here were definitively resolved two Terms ago in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000)—which involved a law that petitioner has acknowledged is "nearly identical" to the law at issue here, and which the court below carefully applied in reaching its decision.

No post-*Geier* decision conflicts with the ruling below. The nine federal courts to address the issue (both before and after *Geier*) have unanimously held that "propeller guard" claims are preempted by the Boat Safety Act. The only contrary decision —a 1994 state court ruling—rests on reasoning that has been repudiated by several recent decisions of this Court, including *Geier* and *United States* v. *Locke*, 529 U.S. 89 (2000). Thus, the petition is nothing more than a quarrel with the application of settled law to this particular case. There is no genuine conflict among the lower courts, and it will be time enough to address the issue if and when a conflict arises.

This Court's denial of certiorari only six months ago in *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), a case presenting the same issue in a nearly identical petition submitted by the same counsel, confirms that this is not a certworthy case. There is no justification for a different disposition here.

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve those goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Prior to the BSA, the federal laws governing boat safety did "not meet current requirements of safe boating." H.R. Rep. No. 92-324, at 9 (1971) ("H.R. Rep."). The Motorboat Act of 1940 imposed limited safety requirements "such as life preservers [and] fire extinguishers." S. Rep. No. 92-248, at 13 (1971) ("S. Rep."). The Boating Act of 1958 was narrower—"primarily a boat numbering statute." H.R. Rep. at 9. Congress thus established a more comprehensive and "coordinated national boating safety program"—the BSA. S. Rep. at 1, 13.

The BSA has three principal components. First, it establishes "a standard numbering system for vessels" that is administered by the Coast Guard. Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("H. Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard).[1]

[1] The statute vests implementing authority in the Secretary of Transportation, who has delegated his functions to the Coast Guard. 49 C.F.R. § 1.46(n)(1).

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the BSA establishes "State boating safety programs" under the auspices of the Coast Guard. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 222-226.

Third, and most important, the Act mandates comprehensive federal design standards for boats and associated equipment (including motors). The Act directs the Coast Guard to prescribe regulations (46 U.S.C. § 4302(a)):

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
> (A) meeting the need for recreational vessel safety; and
> (B) being stated, insofar as practicable, in terms of performance * * * .

In considering whether to adopt a manufacturing standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council"). 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all of whom are appointed by the Secretary of Transportation, must have expertise in recreational boating safety and must represent three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of boat manufacturers; and (c) seven representatives of national boating organizations and the general public. *Id.* § 13110(a), (b)(1).

B. Preemption Under The Federal Boat Safety Act

The BSA grants the Coast Guard plenary authority to require that manufacturers comply with its "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Because of their effect on interstate and maritime commerce, Congress was particularly concerned that any such manufacturing requirements be nationally uniform: "The need

for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14. Accord H.R. Rep. at 29; see H. Hearings at 61 ("several States are developing requirements of their own in law[s] which are varied and it is quite important both for the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland). As Representative Monagan explained: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report states: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions

> or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The Act thus insures that boat manufacturers are not subject to "compliance with widely varying local requirements." S. Rep. at 20. By mandating that any state laws, regulations, or requirements be "identical" to some regulation issued by the Coast Guard, the preemption clause "preempts the field on boating standards or regulations." H.R. Rep. at 11.

C. The Federal Boat Safety Act's "Savings Provision"

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill. See S. Rep. at 31. "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter," this provision states, "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

The only recorded discussion of this provision in the House was a brief colloquy on the floor, in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971). The Senate's "technical" amendment "was concurred in" by the House, and the Act was adopted. *Ibid.*

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, flotation materials, electrical and fuel systems, personal flotation devices, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). For example, the Coast Guard regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement" of outboard motors, and the "quick turn"

capability of boats equipped with such motors. *Id.* § 183.53 (boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle"). The Coast Guard also has authority to notify manufacturers of product defects, and manufacturers must certify that their products comply with all federal design standards. *Id.* §§ 179.11, 181.7, 181.15.

1. The Coast Guard's study of propeller guards

In 1988, the Coast Guard considered whether to require manufacturers to install propeller guards on their boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water."
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (Ill. App. A29). The NBSAC in turn appointed a subcommittee to "review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." *Id.* at A2.

2. The Subcommittee's makeup and methodology

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. Ill. App. A55. Throughout its

study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from a wide range of interested parties—designers of propeller guards, accident victims and their attorneys, marine engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, journal articles, patents, on-water test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country, and it conducted its own on-water tests, where members were given opportunity to drive boats both equipped and unequipped with propeller guards. Ill. App. A2-A5, A34-A39, A41-A43.

3. The Subcommittee's study of propeller guards

The Subcommittee carefully studied each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. Ill. App. A13-A14. Observing that a propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." *Id.* at A6.

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[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988) (public notice of Propeller Guard Subcommittee meeting on Sept. 22-23, 1988, stating that the meeting "is open to the public" and inviting "oral" or "written statement[s]"); *id.* at 43070 (Oct. 25, 1988) (same for Subcommittee meeting on Nov. 14, 1988); *id.* at 43069 (same for NBSAC meeting on Nov. 15-16, 1988); 54 Fed. Reg. 15068 (Apr. 14, 1989) (same for Subcommittee meeting on May 13, 1989 to "[d]iscuss the pros and cons of Propeller Guards"); *id.* at 15066 (same for NBSAC meeting on May 11-12, 1989); *id.* at 42138 (Oct. 13, 1989) (same for Subcommittee meeting on Nov. 4, 1989); *ibid.* (same for NBSAC meeting on Nov. 6-7, 1989).

Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. Ill. App. A15. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." *Id.* at A17. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." *Id.* at A21-A22.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." Ill. App. A14. The Subcommittee, however, found that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." *Id.* at A16.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." Ill. App. A14, A16.

4. The Subcommittee's conclusions

Based on the available data, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard; (b) materially

interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." Ill. App. A21. The Subcommittee flatly rejected the "assert[ion] that propeller guard technology and/or availability meets the foregoing criteria." *Ibid.* Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3.

The Subcommittee thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." Ill. App. A22, A24. As stated in the Report's conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Id. at A24-A25. The Subcommittee accordingly recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," but rather should focus on efforts such as "awareness campaigns" regarding "hazards associated with careless or negligent boat operation." *Id.* at A25. There were no "minority or dissenting statements." *Id.* at A2.

5. The Coast Guard's adoption of the Subcommittee's Report and Recommendations

The 21-member NBSAC and the Coast Guard *unanimously* adopted all of the Subcommittee's recommendations. Ill. App. A74; *id.* at A274 ("All of the report's recommendations are accepted" and "will be implemented"). In conformity with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly determined that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Id.* at A25, A274 (emphasis added). In addition to the accident data, the Coast Guard cited "economic" and "feasib[ility]" concerns as grounds for rejecting a propeller guard requirement. *Ibid.*

The Coast Guard noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." Ill. App. A274. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding high-speed recreational boats.[3] Nor has it issued any regulation requiring any boat to be equipped with such a guard or permitting the States to adopt such a requirement. To the contrary, in one recent notice of proposed rulemaking, it reiterated that "[u]nder

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). The Coast Guard has received "very general" comments in response to its 1995 notice. 65 Fed. Reg. 23144, 23148 (Apr. 24, 2000).

current Federal statutes (46 U.S.C. 4306), the States *do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction.*" 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) (emphasis added). The Coast Guard has held this view since the Act's adoption. See 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973).

D. The Proceedings Below

The complaint alleges that on July 10, 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. Ill. App. A278. Ms. Sprietsma, a 41-year-old woman, allegedly was struck by the boat motor's propeller and sustained injuries resulting in death. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine in 1988, equipped with a traditional propeller. *Id.* at A289-A290.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. Ill. App. A278. The lake was created by a federal dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and Harbors Act of 1946. It covers some 935 square miles and has more than 600 miles of shoreline, as well as seven federal recreation areas, 14 commercial marinas, and dozens of lodges, motels, and campgrounds. See generally http://www.lrn.usace.army.mil/op/DAL/rec/ (visited Dec. 4, 2001).

Rex Sprietsma later filed this suit against Mercury Marine and Ebbtide Corporation, the boat's manufacturer. Asserting theories of strict liability and negligence, he alleged that the boat's motor was defectively designed because it lacked a "propeller guard" that would have prevented Ms. Sprietsma's death. Ill. App. A277-A285. He also alleged that the boat, a 1988 Ebbtide ski boat, was defective because it "[a]llowed for

open bow seating to the very front edge of the bow," lacked "sufficient back support in the seating" or "any substantial form of rail or guard to obstruct a fall out of the boat," and failed to warn of these risks. *Id.* at A286.

Mercury Marine moved to dismiss the complaint, contending that the claims against it were preempted by the BSA. The Cook County Circuit Court granted the motion. Noting that the Coast Guard's "consideration of the propeller guard regulation or the lack thereof was substantial and within the guidelines set forth by [the BSA]," it held that the Coast Guard's decision not to require propeller guards impliedly preempted tort claims that would impose such a requirement. Ill. App. A292-A293, A295. The Appellate Court unanimously affirmed, observing that "every federal court to have considered the issue" has held that the BSA preempts propeller guard claims. Pet. App. 38.

In a detailed opinion that carefully canvassed governing Supreme Court precedents, the Illinois Supreme Court affirmed the lower courts' decisions. The court began by noting that the BSA, which applies to recreational boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Because propeller guard claims "bear upon an area historically regulated by the federal government," the court stated, "'an assumption of nonpre-emption is not triggered.'" *Ibid.* (quoting *Locke*, 529 U.S. at 108).

The court went on to hold that petitioner's claims were impliedly preempted under a long line of this Court's decisions, including *Geier*, *Locke*, and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). Pet. App. 12-17. Quoting this Court's holding in numerous cases that "'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate,'" the court concluded (Pet. App. 13, 15-16):

> [T]he Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

The court was also persuaded by the reasoning of *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 615 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001), which held that "'where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.'" Pet. App. 18-19.[4]

REASONS FOR DENYING THE PETITION

The petition satisfies none of this Court's criteria for a grant of certiorari. Its central theme is that this Court should take its "first meaningful opportunity" (Pet. 11) to address the question presented in *Lewis* v. *Brunswick Corp.*, No. 97-288, which settled before decision. But the issues raised in *Lewis* (and in this case) have been resolved by intervening decisions of this Court, including *Geier* and *Locke*. The court below carefully applied those precedents in concluding that the Coast Guard's considered decision regarding propeller guards has preemptive force, and nine other federal courts—including the only other post-*Geier* case—have unanimously reached the same result.

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[4] The court further held that petitioner had waived his various arguments concerning the date of manufacture of the motor in question and accordingly did not address them. Pet. App. 19.

See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1402 (2001). Thus, the petition presents nothing more than a disagreement over the application of this Court's recent decisions to the facts of this particular case, which is not worthy of a grant of certiorari. See Rule 10. There will be other opportunities to review the issue should a conflict arise in the future.

Moreover, several other prudential considerations warrant a denial of certiorari. The decision below is of no practical importance because petitioner could not recover under Illinois law even if his tort claim were allowed to go forward. In addition, this case arose in state court and part of the proceeding—petitioner's claim against Ebbtide Corporation, the boat's manufacturer—is still pending. It thus appears that the decision below is not final as to all parties. Finally, the decision below is fully consistent with this Court's preemption rulings, with the federal interest in uniform design requirements for boats in interstate commerce, and with the public interest in boat safety. There is no ground for further review.

I. THE PETITION FAILS TO SATISFY ANY OF THE CRITERIA FOR A GRANT OF CERTIORARI.

A. This Court's Recent Decisions Have Resolved The Legal Issues Left Undecided In *Lewis* v. *Brunswick Corporation*.

Petitioner's principal argument for certiorari is the claim that "[t]his case involves the same issue raised by *Lewis* v. *Brunswick Corp.*, No. 97-288," which settled before a decision on the merits. Pet. i. Because this Court granted review in *Lewis*, the argument goes, it should grant review here as well.

Lewis presented two related questions: first, whether "it is constitutionally permissible to imply the federal pre-emption of state common law claims" when a statute contains both express preemption and savings clauses; and second, whether "torts of

omission [can be] impliedly preempted" under a statute that contains a savings clause. Pet. i in No. 97-288.

This Court answered both of these questions in *Geier*. As to whether implied preemption principles apply to laws containing both express preemption and savings clauses, *Geier* expressly held that such provisions "do[] *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869. And as to whether a "tort of omission" can be impliedly pre-empted in the face of a savings clause, *Geier* itself involved such a tort—a "failure to install" claim—yet the Court held that allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to impose such a requirement. *Id.* at 881. That a case involves a "failure to install" claim does not alter this Court's analysis: the inquiry remains whether the claim "actually conflicts" with the federal regulatory scheme, either by making it "'impossible' for private parties to comply with both state and federal law," or by "frustrat[ing] the accomplishment of a federal objective." *Id.* at 873.

Petitioner attempts to discount *Geier* as "narrowly confined to the particular regulation at issue." Pet. 24. In the court below, however, he argued vehemently that the statutory provisions at issue in *Geier* and those at issue here were "nearly identical." Pet. 5 in Ill. No. 89492. Moreover, he sought review in the Illinois Supreme Court on the basis of this Court's pending decision in *Geier* (*id.* at 4-5, 17), and most of his merits brief below was devoted to arguments concerning *Geier*.

The court below faithfully applied *Geier* in holding that a jury verdict imposing a duty to install propeller guards would "present an obstacle to the accomplishment and execution of the purposes and objectives Congress sought in enacting the FBSA." Pet. App. 16. Petitioner's disagreement with the lower court's application of these "ordinary pre-emption principles, grounded in longstanding precedent" (*Geier*, 529 U.S. at 874), does not warrant a grant of certiorari.

Any remaining issue presented in *Lewis* was disposed of in *Locke*, which addressed the preemptive effect of Coast Guard decisions concerning the design and construction of maritime vessels. Specifically, petitioner complains that the court below entered uncharted waters in holding that a federal decision not to regulate can have preemptive effect in the "absence of any federal regulation." Pet. 20. But *Locke* unanimously reaffirmed that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," citing this Court's repeated holdings that "'where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation." 529 U.S. at 99, 110 (citations omitted). As the Court in *Locke* stated in reference to the Coast Guard: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." *Id.* at 111.

As with *Geier*, the court below carefully analyzed *Locke* in rendering its opinion. It explained that "'the relevant inquiry for * * * pre-emption'" is "'whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all'" and concluded that the Coast Guard's "informed decision that no regulatory action should be taken to require propeller guards" "equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA." Pet. App. 15-16 (quoting *Locke*, 529 U.S. at 110). Here again, petitioner dislikes this application of settled precedent, but there is no reason to review an application of principles that this Court laid down just two Terms ago—especially under a statutory scheme that petitioner concedes is "nearly identical" to that in *Geier*. If a conflict arises in the future, this Court can address the issue at that time.

B. The Lower Courts Are Not Divided Over The Issue Of BSA Preemption Of Propeller Guard Claims.

Petitioner next argues that review is necessary to resolve a "direct conflict" among the lower courts. Pet. 3. He concedes (at 11) that "a host" of courts have held that the BSA preempts propeller guard claims—indeed, the decision below accords with that of *every* federal court and several state courts to address the issue[5]—but asserts that the decision below conflicts with one 1994 state court decision, *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994).

Contrary to petitioner's claim, there is no genuine conflict. To begin with, the court in *Moore*, like the lower court here, rejected the contention that the BSA expressly preempts propeller guard claims, 889 S.W.2d at 249-251, and petitioner himself notes that the decisions are in agreement on that score. Pet. 13-14.

As for implied preemption, the reasoning of *Moore* has been overtaken by that of *Geier* and this Court's other recent preemption rulings. *Moore* held that the presence of an express preemption clause precluded a finding of implied preemption. 889 S.W.2d at 251 n.10. But that view was decisively rejected in *Geier*, which found conflict preemption in the face of a similar provision. 529 U.S. at 869 (an express preemption provision "does *not* bar the ordinary working of conflict preemption principles"); see also *Freightliner Corp.* v. *Myrick*,

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[5] See *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Marine Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

514 U.S. 280, 287 (1995) (rejecting the Eleventh Circuit's view "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute").[6]

Similarly, the *Moore* court was of the view that the BSA's savings clause indicated Congress's intent to preserve even common law claims that were in "tension" with federal policy. 889 S.W.2d at 252. But *Geier* rejected the view that a savings clause may be interpreted "to 'save' all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act." 529 U.S. at 870.

Likewise, *Moore* reasoned that "damage awards" are "not equivalent to * * * positive enactments," since "a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer—installing guards on future boats or taking no action and bearing the liability as a cost of doing business." 889 S.W.2d at 251. *Geier*, by contrast, held that "rules of law that judges and juries create or apply" in tort suits may remove a manufacturing choice that federal regulators intended to preserve. 529 U.S. at 871.

Finally, *Moore* applied a presumption against preemption, reasoning that the lawsuit implicated the safety of boats "on [Texas's] waterways." 889 S.W.2d at 251. *Locke*, however, made clear that no such presumption applies to the regulation of "maritime commerce" (529 U.S. at 108); the accident here occurred on an interstate body of navigable water (see *supra* p.11); and Congress relied upon its "historic maritime jurisdiction" in enacting the BSA. S. Rep. at 17; see *id.* at 20 (citing "the long history of preemption in maritime safety matters" and "the need for uniformity applicable to vessels moving in

[6] Indeed, the *Moore* court cited the Eleventh Circuit's decision in *Myrick* for the proposition that the presence of an express preemption clause foreclosed any implied preemption analysis. See 889 S.W.2d at 251 n.10. As shown in the text, however, this Court expressly repudiated that aspect of the Eleventh Circuit's reasoning when the case came before it on certiorari.

interstate commerce"); see also *Geier*, 529 U.S. at 873 (declining to apply an "unusual, 'special burden' against pre-emption").

In sum, at every point in its reasoning, *Moore* adopted legal conclusions that have since been rejected by this Court's decisions. There is no reason to believe that the Texas Supreme Court would reach the same result today—especially when three justices dissented in *Moore* for reasons that this Court validated in *Geier* and *Locke*. See 889 S.W.2d at 252-257; *Worthy* v. *Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998) ("We are also bound to follow the decisions of the United States Supreme Court, the final authority on federal preemption issues"). Thus, *Moore* does not give rise to any conflict with the decision below.

Apart from the decision below, the only other post-*Geier* case to address BSA preemption of propeller guard claims is *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000). Applying *Geier* and *Locke*, the court there held that allowing such claims to proceed "would present an obstacle to and frustrate the flexible approach towards propeller guards adopted by the Coast Guard." *Id.* at 614.

Like the court below, the Fifth Circuit in *Lady* rejected the argument that claims implicating "maritime commerce" are entitled to a "presumption against preemption." 228 F.3d at 607. Like the court below, it rejected the view that the BSA "expressly preempts" propeller guard claims. *Id* at 611. Like the court below, it rejected the argument of the Solicitor General in *Lewis*. *Id.* at 615 n.23. And like the court below, it rejected the contention that propeller guard claims are not preempted "as long as the Coast Guard has not promulgated a regulation that conflicts with the common-law requirement." *Id.* at 611-612. "Rather," the court held, "where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation

and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." *Id.* at 615. *Lady* is thus on all fours with the decision below.

Without dissent, this Court denied the petition for certiorari in *Lady*—which was an *almost verbatim* copy of the petition filed here, raising identical arguments. 121 S. Ct. 1402 (2001). The petitioner's counsel there (also counsel here) argued that there was a conflict between the Fifth Circuit's decision and *Moore*, and that review was needed "to finish the job started in *Lewis*." Pet. 15 in No. 00-1031. OMC responded that *Geier* resolved the question presented in *Lewis*, and that the Solicitor General's arguments in *Lewis* and the reasoning of *Moore* have been rejected by recent decisions. The only development since *Lady* is the decision below. Thus, every post-*Geier* decision has held that the BSA impliedly preempts propeller guard claims.[7]

C. The Decision Below Is Fully Consistent With The Decisions Of This Court.

Faced with the absence of any genuine conflict among the lower courts, petitioner resorts to the assertion that the decision below conflicts with this Court's precedents. Pet. 15-25. He

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[7] Petitioner tries to divert attention from the denial of certiorari in *Lady* by noting that OMC filed a Chapter 11 bankruptcy petition shortly after Lady sought certiorari. Pet. 11-12. In his reply brief in support of certiorari (at 7-9), however, Lady (represented by petitioner's counsel here) vigorously argued that "OMC's bankruptcy is not a reason to deny the writ," since he could obtain relief from the stay and potentially recover a substantial amount on remand if he prevailed. That assertion was plainly correct. The fact that OMC was in reorganization proceedings does not mean that Lady would have been unable to pursue his tort claim. Bankruptcy courts routinely lift the automatic stay to permit a determination of the validity of a claim in other litigation, particularly where necessary to avoid loss of the entire claim. See 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (15th ed. rev. 2001); *Foust* v. *Munson S.S. Lines*, 299 U.S. 77 (1936) (district court abused its discretion in staying wrongful death suit against company involved in reorganization proceeding). A bankruptcy court would undoubtedly lift the stay to permit briefing and argument of a case in which this Court granted certiorari.

makes three such claims—that the decision is inconsistent with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); that it misapplied *Locke* in declining to apply a "presumption against preemption"; and that it failed to give sufficient weight to the Solicitor General's brief in *Lewis*. None of these arguments has merit.

Myrick involved a federal safety standard prescribing short stopping distances for semitrailers. The Ninth Circuit invalidated the standard on the ground that the National Highway Traffic Safety Administration ("NHTSA") had not considered the failure rate of anti-lock brake systems ("ABS"), which were needed to comply with the standard. 514 U.S. at 284-285. NHTSA thereafter amended the standard so that the distance and lock-up requirements no longer applied to semitrailers. *Id.* at 285.

The plaintiffs in *Myrick*, who were injured in accidents with trucks lacking ABS, claimed that "the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants replied that the absence of any federal standard governing truck stopping distances evidenced an intent to leave the issue unregulated, thus impliedly preempting the plaintiffs' claims. This Court rejected that argument, however, explaining that "the lack of federal regulation *did not result from an affirmative decision of agency officials to refrain from regulating air brakes*." *Id.* at 286 (emphasis added).

In contrast to *Myrick*, this *is* a case where the absence of a federal regulation resulted from the agency's "affirmative decision to refrain" from regulating. As both the court below and the Fifth Circuit held: "'the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate.'" Pet. App. 12 (quoting *Lady*, 228 F.3d at 612).

Moreover, the plaintiffs in *Myrick* merely sought to impose a state-law duty that was effectively identical to the short-lived

federal regulation. NHTSA wanted to regulate truck stopping distances; it had specifically endorsed ABS; and it had imposed a rule that would have required trucks to install ABS, only to have a court declare it invalid. Here, by contrast, the Coast Guard affirmatively determined that propeller guards should *not* be required, and petitioner advocates a duty directly contrary to this judgment. Thus, *Myrick* is wholly inapposite—as the lower courts have consistently recognized. Pet. App. 11-12; *Lady*, 228 F.3d at 612; *Lewis*, 107 F.3d at 1503-1504.

Petitioner next argues that the court below, in not applying a presumption against preemption, "misrea[d] this Court's recent decision in *Locke*." Pet. 21. He claims that *Locke* is irrelevant because this case involves "*recreational* vessels" and "has nothing to do with maritime commerce," because the accident here took place in "state waters," and because *Locke* involved "international" issues and "ocean-going oil tankers." *Id.* at 20-21. These arguments are without foundation.

First, the fact that this case involves *recreational* boats does not mean it does not implicate *interstate commerce* and *federal waterways*. Pleasure boating is a multi-billion-dollar industry, manufacturers make pleasure boats for national markets, and such boats routinely cross state lines (as petitioner's boat did here). As Congress explained in adopting the Act at issue: federal preemption in this context "conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; accord *id.* at 14 (citing "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded"). Thus, Congress fully understood that manufacturing standards for recreational boats directly affect interstate commerce. See also *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 675 (1982) ("[a] collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce").

Nor did this case arise in "state waters." As explained above (at 11), the accident here occurred in the Dale Hollow chain of lakes—a navigable and interstate body of water that crosses the Tennessee-Kentucky border and that was created by federal authorities acting under federal legislation. The "jurisdictional applicability" of the BSA extends to every recreational vessel "within the historic federal maritime jurisdiction—the navigable waters of the United States, [and] certain internal waters which are in the exclusive or concurrent jurisdiction of the United States." S. Rep. at 17. In sum, petitioner cannot plausibly claim that this accident occurred on state waters that are not "subject to the jurisdiction of the United States." 46 U.S.C. § 4301(a).

It makes no difference that *Locke* involved "international" concerns and "ocean-going oil tankers." Congress understood the BSA to be as closely related to maritime commerce as the Act at issue in *Locke*; the BSA applies as fully to boats on land-locked lakes as to those "on the high seas" (§ 4301(a)); and the federal government's paramount authority over maritime commerce does not depend on its being foreign or international in scope. *Foremost*, 457 U.S. at 674-677. As the Fifth Circuit explained in *Lady*: "any distinction between recreational vessels and tankers is of little significance, as the national interest in vessels operating on navigable waters of the United States encompasses both." 228 F.3d at 607.[8]

Moreover, even if petitioner's arguments regarding *Myrick* and *Locke* were correct (and they are not), they would represent nothing more than a quarrel over the Illinois Supreme Court's application of this Court's recent decisions to the particular

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[8] It is well settled that "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *Fidelity Fed. Sav. & Loan* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)).

facts of this case. Petitioner does not deny that a federal decision not to regulate can have preemptive force when it is based on an affirmative determination that the area is best left unregulated; he simply disagrees that this is such a case. Nor does he dispute that a "presumption against preemption" does not apply to regulation of maritime commerce; he simply disagrees that this case involves such commerce. These disagreements do not justify this Court's review. See Rule 10 ("misapplication of a properly stated rule of law" is an insufficient basis for certiorari).

Finally, petitioner says that the decision below disregarded precedent in not deferring to the Solicitor General's brief in *Lewis*, which argued that the BSA does not preempt propeller guard claims. Pet. 23-25. But as the court below explained:

> [A]rguments made in the *Lewis* brief have been rejected by the Supreme Court in *Geier*. For example, the Solicitor General in the *Lewis* brief argued that the existence of the savings clause (section 4311(g)) "makes clear Congress's explicit intent to preserve tort liability." But the *Geier* Court found implied preemption in the presence of the savings clause and rejected the argument that this clause "bar[red] the ordinary working of conflict pre-emption principles."

Pet. App. 18; see *Lady*, 228 F.3d at 615 & n.23 (the Solicitor General's views in *Lewis* were not "sufficient to overcome the reasons supporting the application of implied preemption").

This is but one of the Solicitor General's arguments in *Lewis* that was rejected in *Geier*. For example, the *Lewis* brief states (at 27) that "a common law claim would be permitted even if a regulation were in existence unless that claim propounded a standard of conduct directly contrary to the federal rule." But *Geier* explained that the "full purposes" of federal law could be frustrated even absent such a direct conflict. 529 U.S. at 873.

Similarly, the brief (at 22) made much of the fact that the BSA's preemption provision did not reference common law claims, stating that "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions." But as *Geier* observed in analyzing a similar provision: "rules of law that judges and juries create or apply in [state tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." 529 U.S. at 871.

And the brief in *Lewis* argued (at 28) that "the absence of a federal regulation does not create a preemptive effect on state common law claims when the federal scheme is not intended to occupy the complete field of motorboat safety." But while the Court in *Geier* made no finding that the Act there "preempted the field," it readily concluded that the government's refusal to require airbags was a considered decision with preemptive force. See 529 U.S. at 874-883.

Furthermore, the Coast Guard did not sign the Solicitor General's brief in *Lewis*—in contrast to its practice in other preemption cases involving its jurisdiction. *E.g.*, U.S. Br. in *Locke* (No. 98-1701). And that brief acknowledged the Coast Guard's "longstanding interpretation" that the Act preempts state safety requirements "regardless of whether a federal standard is in existence." *Lewis* Br. 15-17. See 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996) ("the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction"); 36 *id.* 15764 (Aug. 18, 1971); 38 *id.* 6914 (Mar. 14, 1973). Thus, it is not the case that the views set forth in the *Lewis* brief are "the United States' only articulated view on the matter." Pet. 10. But in any event, those views have been rejected by subsequent decisions of this Court.

The holding below is consistent not only with *Myrick*, *Locke*, and *Geier*, but also with a long line of this Court's precedents.

As the court below recognized (Pet. App. 13-15), it is well settled that a federal decision not to regulate has preemptive force where based on a considered study of the regulatory question. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). As the Court stated in the leading case in this area—involving the Coast Guard's authority—the "relevant inquiry" is "whether the Secretary has either promulgated his own [requirement] * * * or has decided that no such requirement should be imposed at all." *Ray*, 435 U.S. at 171-172. Accord *Locke*, 529 U.S. at 104, 107 (reaffirming *Ray*'s "essential framework," "analytic structure," and "holding"). There is no reason to review the Illinois Supreme Court's ruling that this is such a case.

It is hard to imagine a more compelling case for application of the principle recognized in these decisions. Pursuant to statutorily prescribed procedures, the Coast Guard conducted a painstaking, 18-month study of propeller guards. Its decision not to require them reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that they were technologically infeasible, economically unjustified, and likely to *increase* safety hazards. Ill. App. A24. As in *Geier*, the Coast Guard focused on a single item of equipment and made a "policy judgment that safety would best be promoted" if that item is *not* required. 529 U.S. at 881. And as in *Geier*, to allow "different juries in different States [to] reach different decisions" "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and override federal safety policies that were "deliberately imposed." *Id.* at 869, 871, 872. See also *id.* at 884 (rejecting the argument that "a formal agency statement of pre-emptive intent [i]s a prerequisite to concluding that a conflict

exists"); *Ray*, 435 U.S. at 178 (holding that the Coast Guard's "failure to promulgate a ban" on large oil tankers took on "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute").

II. THIS CASE IS NOT A PROPER VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Quite apart from the petition's failure to satisfy the criteria of Rule 10, review is also unwarranted for various prudential reasons. To begin with, a decision here would be of no practical importance because petitioner could not recover under Illinois tort law even if his claim were allowed to proceed. In Illinois, a party alleging a design defect must satisfy § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), which imposes strict liability on makers of "unreasonably dangerous" products. See *Lamkin* v. *Towner*, 563 N.E.2d 449 (Ill. 1990). Time and again, Illinois courts have held that a product is not "unreasonably dangerous" if its risks "derive merely from those inherent properties * * * which are obvious to all who come in contact with [it]." *Hunt* v. *Blasius*, 384 N.E.2d 368, 372 (Ill. 1978).[9]

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[9] See *Miller* v. *Dvornik*, 501 N.E.2d 160, 164 (Ill. App. 1986) (holding that a motorcycle is not defective for lack of crash bars and stating that "[i]t is well settled that injuries are not compensable if they are caused by inherent propensities of a product which are obvious to all who come into contact with them"); *Scoby* v. *Vulcan-Hart Corp.*, 569 N.E.2d 1147, 1151 (Ill. App. 1991) (holding that a deep fat fryer is not defective for lack of a protective cover and stating that "[c]onsidering not only the obvious nature of any danger here but, also, the simple nature of the mechanism involved, * * * summary judgment for the defendant was clearly proper"); *Jarke* v. *Jackson Products*, 631 N.E.2d 233, 238 (Ill. App. 1994) (holding that a welding mask was not unreasonably dangerous for failure to include an ear guard and stating that "the only pertinent inquiry is whether the product is unreasonably dangerous in the state in which it is used"); *Todd* v. *Societe BIC, S.A.*, 21 F.3d 1402, 1407 (7th Cir. 1994) (en banc) (holding that a cigarette lighter was not unreasonably dangerous for lack of a child-restraint device; stating that "[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product").

These holdings fully apply to a boat motor's propeller, the dangers of which are readily apparent to the ordinary consumer. Much as a chef must appreciate the dangers of a sharp knife, or a lumberjack the dangers of a saw's spinning chain, members of the boating public must appreciate the danger of an outboard motor's high-speed propeller blades—as numerous courts have held. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir. 1990) (reversing a verdict finding that a propeller was defective for lack of a guard on the basis that "products whose inherent danger is patent and obvious, do not, as a matter of law, involve defects of a sort that a jury should resolve," and explaining that "the ordinary consumer clearly understands that a revolving propeller involves danger").[10]

[10] In addition to *Elliott*, see *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 324-325 (Pa. Super. Ct. 1993) (reversing a jury verdict for the plaintiff because "[a] competent person knows that he or she must stay clear of the churning blades of an outboard motor in the same way as a person avoids airplane propellers, chain saw teeth, and lawn mower blades," and because "it cannot be said with any degree of certainty that the risk of injury will be reduced by a safety guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867-868 (8th Cir. 1993) (unguarded propellers "[are] not dangerous beyond the expectations of the ordinary consumer" and "do not, as a matter of law, involve defects of a sort that a jury should resolve"); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) (entering judgment for the manufacturer and citing the "absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1583 (M.D. Ga. 1991) ("a pleasure boat's unguarded propellers are not dangerous beyond the expectations of the ordinary consumer"; "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447, 449-450 (Ala. 1991) (finding no "jury issue" because "a propeller guard that arguably creates other dangers is not a safer design"); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188, 191 (Ala. 1991) (holding that "the trial court should not have submitted the [defective design] charge to the jury" and rejecting the claim "that because there were several patents available for propeller guards, Mercury Marine was negligent or wanton in failing to utilize them on its boats").

In light of this overwhelming body of authority, there is no substantial ground to doubt that Illinois courts would reject petitioner's claim as a matter of substantive tort law. It would thus be a waste of private and judicial resources to debate the preemption issue in this context.

Moreover, it is questionable whether this Court has jurisdiction in this matter. Under 28 U.S.C. § 1257(a), the Court may review federal issues arising from "[f]inal judgments or decrees rendered by the highest court of a State." In order to satisfy the finality requirement, the judgment from which review is sought must be final as to all parties and issues. See *Flynt* v. *Ohio*, 451 U.S. 619, 620 (1981) (per curiam) ("the final-judgment rule has been interpreted 'to preclude reviewability where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State'"); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920) (the judgment "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action"); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948).

Petitioner, however, sued not only respondent, but Ebbtide Corporation, alleging that its boat was defectively designed because it lacked adequate handrails and failed to warn passengers of inadequate back support in the boat's seating. See *supra* p. 12. The Circuit Court granted respondent's motion to dismiss, and that decision was affirmed on appeal. Petitioner's claim against Ebbtide, however, is still pending.[11] A trial below may result in full relief (rendering the issue here moot), or it may raise other issues of federal law (*e.g.*, relating to punitive damages or other federal regulatory standards). In any event, the decision below did not resolve petitioner's claims against

[11] After the decision of the Illinois Supreme Court, the Circuit Court of Cook County reinstated petitioner's remaining claim against Ebbtide on its trial docket. See Order (Cook County Circuit Ct. No. 01L14400) (Dec. 4, 2001).

all parties, and the federal question presented here is not conclusive of the remaining proceedings below.

Finally, it merits emphasis that the decision below is fully consistent with the public interest in safe boating. After careful study, the Coast Guard determined not only that propeller guards were infeasible for any recreational speedboat, but also that they would give boaters a false sense of security and increase the occurrence of serious accidents. Numerous courts have held that speedboats are not defective for lack of propeller guards, citing "the consensus of experts that the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate." *E.g.*, *Elliott*, 903 F.2d at 1509. Thus, the decision below accords with the public interest in ensuring that boats be as safe as possible.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2001

[12] At the present time, boating accidents involving propellers are very rare. As the Subcommittee found, the "risk of fatality" from recreational power-boating is small in comparison to that of other activities, including other types of boating: estimated fatalities per each million activity hours were "1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (*within which the risk of propeller strike itself is a very small fraction*)." Ill. App. A11 (emphasis added).

Supreme Court, U.S.
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No. 01-706

IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir., *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first meaningful opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

Mercury Marine's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000) – have "definitively resolved" the core questions presented in this case and discredited the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994). As we now explain, these arguments are meritless.

1. Neither *Geier* nor *Locke* Resolved the Federal Preemption Question Presented in *Lewis* and this Case.

A. *Geier*'s Implied Preemption Holding Has No Bearing Here.

Mercury Marine's principal claim is that *Geier* repudiated the Texas Supreme Court's decision in *Moore*,

thereby effectively eradicating the split of authority that gave rise to the grant of *certiorari* in *Lewis*. In so arguing, Mercury Marine mischaracterizes *Geier* as holding that "allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to install an airbag requirement." Opp. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claims that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id.*

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no* regulatory action at all), *Geier* involved a highly complex federal safety standard that did, in fact, regulate the use of airbags. In *Geier*, this Court confronted the 1984 version of a federal motor vehicle safety standard promulgated by the National Highway Traffic and Motor Vehicle Safety Administration ("NHTSA") – Standard 208 – that required auto manufacturers gradually to "phase-in" the use of passive restraint devices in passenger automobiles. Unlike the typical minimum safety standards promulgated by NHTSA, Standard 208 "deliberately sought variety . . . by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." 529 U.S. at 878. The Court emphasized that NHTSA sought a "mix of devices" because of safety concerns associated with airbags. *Id.* at 878-79. *Geier* further stressed that, in NHTSA's view, a "mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with

airbags, and could facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 879.

Against this backdrop, *Geier* held that a common-law damages action holding a manufacturer liable for its failure to install an airbag would conflict with NHTSA's goal of encouraging a mixture of passive restraint devices. *Id.* at 880. The Court wrote that "a rule of state tort law imposing [liability for failure to install airbags] . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* In so ruling, *Geier* gave "special weight" to an *amicus curiae* brief filed by the United States, in which the agency strenuously argued that no-airbag claims would conflict with and substantially undermine NHTSA's regulatory goals. *See id.* at 886.

The facts here could not be farther from those in *Geier*. Unlike the complex set of regulatory obligations imposed by Standard 208, which affirmatively encouraged a mixture of passive restraint devices, *there is no federal regulation whatsoever governing propeller guards.* As previously explained, the only action taken by the Coast Guard with regard to these devices was to task a subcommittee of its Advisory Council (which included, among others, industry representatives and members of the public) with investigating whether the federal government should begin to develop a regulation requiring propeller guards on passenger boats. *See* Pet. at 5. The Coast Guard ultimately decided not to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. *Id.* at 6. To date, there is no federal safety standard governing (or even addressing) the use of propeller guards. Thus, unlike in *Geier*, there is no federal regulatory framework

with which petitioner's common-law claims could possibly conflict.

This conclusion is underscored by the fact that, in *Lewis*, the United States filed an *amicus curiae* brief confirming that no-propeller-guard claims exactly like petitioner's do not in any way conflict with federal regulatory purposes. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lewis v. Brunswick Corp., 522 U.S. 978 (1997) (No. 97-288) ("*Lewis* Brief"). This position stands in stark contrast to the United States' *amicus curiae* brief in *Geier*, which vigorously asserted that no-airbag claims would frustrate and undermine the goals of Standard 208. *See* 529 U.S. at 880. And *Geier* itself confirms that the Solicitor General's views on the preemptive effect of an agency's regulatory decisions are entitled to some deference. *Id.* at 882, 886. *See also Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions). Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[1]

[1] Mercury Marine attempts to avoid the United States' anti-preemption position in *Lewis* by arguing that the Solicitor General's reasoning, like that of the Texas Supreme Court in *Moore*, has been discredited by *Geier*. *See* Opp. at 24-25. This argument is meritless. First, the *Lewis* Brief's suggestion (at 21) that the Boat Safety Act's savings clause "makes clear Congress's explicit intent to preserve tort liability" is, contrary to respondent's claim, in no way contrary to *Geier* and ultimately irrelevant to the United States' rejection of preemption, which hinged on the fact that there is clearly no conflict between no-propeller-guard claims and the Coast Guard's regulatory purposes. *Id.* at 25-27. Second, the *Lewis* Brief's recognition (at 22) that the "regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions" is, in fact, supported by ample authority and is wholly consistent with *Geier*. (As explained *infra* at 7-8, *Geier* explicitly acknowledged, and did not

B. *Locke*'s Preemption Holding is Equally Inapplicable to this Case.

Mercury Marine also argues that "any remaining issue presented in *Lewis* was disposed of in *Locke*," which stated that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority." Opp. at 16. *Locke*, however, did little more than reaffirm this Court's previous holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), that Title II of the Ports and Waterways Safety Act of 1972 ("PWSA") expressly preempts the entire field of state laws and regulations governing ocean-going oil tankers used in international commerce.[2] Within the context of a field preemption statute like the PWSA, it made sense for this Court to "reaffirm" that regulatory inaction may exert a preemptive effect on state law. This holding has virtually nothing to do with this case, however, given that the

purport to overrule, numerous prior decisions of this Court making precisely this point.) Third, the *Lewis* Brief's argument (at 28) that, absent a statute that affirmatively preempts the entire field of state action, regulatory inaction lacks preemptive effect, is fully consistent with *Geier*, given that *Geier* did not involve a "field preemption" statute and did not involve regulatory inaction. In short, *Geier* did not undermine the validity of any of the arguments set forth in the Lewis Brief, and Mercury Marine's arguments to the contrary are simply wrong.

[2] As the Supreme Court explained in *Ray* (and reiterated in *Locke*), Title II of the PWSA *requires* the Coast Guard to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Ray*, 435 U.S. at 168; *Locke*, 529 U.S. at 110. *Ray* and *Locke* both reasoned that, given Title II's mandatory directive that the Coast Guard impose national regulations governing the general seaworthiness of tankers and their crews, "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 110.

Boat Safety Act, unlike the PWSA, does *not* preempt the field of boat safety.

As explained by the United States in *Lewis*, the Boat Safety Act "is quite distinctive from the [PWSA]" insofar as it "does not require the [Coast Guard] to issue regulations, but rather merely permits [the agency] to do so." *Lewis* Brief at 29. *See also* 46 U.S.C. § 4302(a). As the United States concluded, this grant of permissive regulatory authority reveals that Congress never intended the Act to preempt the entire field of boat safety regulation, given that the Coast Guard has the option of doing *nothing* under the Act (and, in fact, has not issued any regulations governing propeller guards). Because the Boat Safety Act does not preempt the regulated field, *Locke*'s language regarding the preemptive effect of regulatory inaction has no bearing here: unlike the PWSA, the Boat Safety Act only preempts state positive law in areas where the Coast Guard has issued regulations governing the subject matter at issue – and it is undisputed that no such action has been taken with respect to propeller guards. Thus, Mercury Marine's suggestion that *Locke* resolves the preemption question presented here has no merit.[3]

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[3] Assuming, however, that the Boat Safety Act (like Title II of the PWSA) preempts the field of state positive law even where the Coast Guard has taken no regulatory action, *Locke*'s holding would still have no bearing here given that common-law claims are expressly preserved by the Act's broadly worded savings clause. *See* 46 U.S.C. § 4311(g). In this respect, this case is very different from both *Ray* and *Locke*, which involved state regulations rather than common-law claims. As the United States explained in *Lewis*, "[t]hat distinction is equally important here, because the [Act] contains a savings clause, but the PWSA, at issue in *Ray*, did not." *Lewis* Brief at 29.

2. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

Equally without merit is Mercury Marine's claim that "there is no genuine conflict" between the decision below and the Texas Supreme Court's decision in *Moore*. *See* Opp. at 17. Mercury Marine argues, first, that *Moore* is no longer good law because its holding that "the presence of an express preemption clause precluded a finding of implied preemption" was rejected by *Geier*. *Id.* *Moore*'s holding on this point is irrelevant, however, because the Texas Supreme Court went on to reach the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

Mercury Marine is also wrong in claiming that *Moore*'s holding that "damage awards" are "not equivalent to . . positive enactments" conflicts with this Court's prior teachings and was definitively rejected by *Geier*. Opp. at 18. In reality, *Moore*'s holding on this point is squarely in accord with numerous prior decisions of this Court recognizing that "the effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of [damage awards]." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions") (plurality); *id.* at 533-34 (Blackmun, J., concurring); *English v. General Electric Corp.*, 496 U.S. 72, 85 (1990) (common-law claims "neither direct nor substantial enough" to be within the preempted field"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

238, 256 (1984) ("Congress intended . . . to tolerate whatever tension there was between [federal regulation and state common-law claims, and] [w]e can do no less.").

Notably, *all* of these cases were cited in *Geier*, which explicitly acknowledged this Court's oft-repeated teachings that the effects of "tort law may be somewhat different" than those of positive law for purposes of determining the extent of federal preemption. *See* 529 U.S. at 882. And *Geier*'s particular holding that the "rules of law that judges or juries create or apply in [tort] suits" may remove a choice that federal regulators intended to preserve has no bearing here, given that the Coast Guard has made crystal clear that it never intended even to address any aspect of manufacturers' decision making with respect to propeller guards. In short, *Moore* remains good law after *Geier*, and is squarely in conflict with the decision below.[4]

[4] Mercury Marine also claims that *Moore* was wrong because it applied a presumption against preemption that was subsequently rejected in *Locke*. *See* Opp. at 18. As explained in our petition, however, there are myriad reasons why *Locke*'s rejection of the presumption against preemption – a holding directed to state regulation of ocean-going oil tankers involved in international maritime commerce – should not apply to a case involving a small recreational vessel on local waters. *See* Pet. at 21-23. Even assuming that the Texas Supreme Court erred in this regard, however, its preemption ruling was still correct, given that the Coast Guard has never regulated propeller guards and the United States itself has taken the position that no-propeller-guard claims do not undermine or frustrate any federal policy.

3. This Case is a Proper Vehicle for Review.

Finally, there is no merit to Mercury Marine's argument that this case is not a proper vehicle for review on the grounds that (1) "petitioner could not recover under state tort law even if his claim were allowed to proceed"; and (2) this Court's jurisdiction is "questionable" due to the pendency of remaining claims against the boat's manufacturer. *See* Opp. at 29. Regarding the former, suffice it to say that the alleged weaknesses of petitioner's claims on the merits (which is a subject of hot dispute and belied by the fact that other injury victims in similar cases have obtained significant recoveries) is hardly a valid reason to decline review. Regarding the jurisdictional argument, the Illinois Supreme Court affirmed judgments dismissing petitioner's claims on the ground that they are preempted by federal law. Mercury Marine neither disputes that this is a final judgment between the parties to this appeal nor produces any authority for the argument that petitioner's claims against other defendants not party to this appeal render the Illinois Supreme Court's dismissal ruling unreviewable under 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), this Court recognized its jurisdiction to review a state court decision where "the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." *See also Brady v. Maryland*, 373 U.S. 83 (1963) (reviewing federal question arising out of criminal conviction before sentencing because sentence would not moot issue). This well-recognized exception to any requirement of technical finality that Section 1257 otherwise might impose plainly applies here, especially given that Mercury Marine will not even be a party to the only remaining state court proceedings it identifies. Respondent's preemption

defense is thus guaranteed to survive these proceedings as a live issue in this case, and the case is properly presented for review.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Date: January 2, 2002

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No. 01-706

In the
Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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DEPARTMENT OF TRANSPORTATION

Coast Guard
[CGD-88-073]
National Boating Safety Advisory Council Subcommittee on Propeller Guards; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety advisory Council's Subcommittee on Propeller Guards to be held on Thursday and Friday, September 22 and 23, 1988, at the Boston Whaler Company, 1149 Hingham Street, Rockland, Massachusetts, beginning at 8:30 a.m. on both days and ending at 5:00 p.m. on Thursday and at 12:00 noon on Friday. The agenda for the meeting will be as follows:

1. To discuss the issue of propeller guards on recreational watercraft relating to personal safety and performance factors.

The Meeting is open to the public. Persons wishing to present oral statements at the meeting should so notify the Executive Director of the council no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain W.S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard, (G-NAB), Washington, D. C. 20593-0001, or by calling (202) 267-0997.

Dated: August 19, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services
[FR Doc. 88-19599 Filed 8-29-88; 8:45 am]
BILLING CODE 910-14-M

53 *Federal Register* 43069
(October 25, 1988)

Coast Guard
[CGD-88-093]
National Boating Safety Advisory Council; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety Advisory Council to be held on Tuesday and Wednesday, November 15 & 16, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 9:00 a.m. and ending at 4:00 p.m. on both days. The agenda for the meeting will be as follows:

1. Introduction and Swearing-in of new Council Members.

2. Review of action taken at the 41st meeting of the Council.

3. Members' items.

4. Executive Director's report.

5. Consumer Education Subcommittee report.

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9. Mandatory Education Subcommittee report.

10. Report of Boating Education Seminar in Louisiana.

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12. Presentation of definition of "Passenger" on recreational boats.

13. Presentation by Accident Reporting Subcommittee.

14. Final report of Personal Flotation Device (PFD) pamphlet project.

15. Presentation of the work of Marine Surveyors.

16. Update on Commercial Towing.

17. Report of Universal Registration Subcommittee.

18. Report on the National Association of State Boating Law Administrators' (NASBLA) Conference.

19. Presentation on Visual Identification for Public service vessels.

20. Remarks by Chief, Office of Navigation Safety and Waterway Services.

21. Reply to members' items.

22. Chairman's session.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons withing [sic] to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William S. Grisworld [sic], Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard, (G-NAB), Washingotn [sic], DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 88-24547 Filed 10-24-88; 8:45 am]
BILLING CODE 4910-14-M

[CGD-88-091]
National Boating Safety Advisory Council Subcommittee on Accident Reporting; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety

Advisory Council's Subcommittee on Accident Reporting to be held on Monday, November 14, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 3:00 p.m. and ending at 5:00 p.m. The agenda for the meeting will be as follows:

1. Seek broad based input and discuss available information and potential new sources of data.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 88-24548 Filed 10-25-88; 8:45 am]
BILLING CODE 4910-14-M

[CGD-88-088]
National Boating Safety Advisory Council Subcommittee on Mandatory Education; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety Advisory Council's Subcommittee on Mandatory Education to be held on Monday, November 14, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 10:00 a.m. and ending at 4:00 p.m. The agenda for the meeting will be as follows:

1. Review materials and formulate a report and recommendation to the Council on mandatory education.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 88-24549 Filed 10-24-88; 8:45 am]
BILLING CODE 4910-14-M

[CDG-88-092]
National Boating Safety Advisory Council Subcommittee on Personal Flotation Devices (PFDs); Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety Advisory Council's Subcommittee on Personal Flotation Devices to be held on Monday, November 14, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 3:00 p.m. and ending at 5:00 p.m. The agenda for the meeting will be as follows:

1. Review materials and replies received from foreign administrations regarding wearing PFDs and standards for PFDs.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 88-24550 Filed 10-24-88; 8:45 am]
BILLING CODE 4910-14-M

[CDG-88-089]
National Boating Safety Advisory Council Subcommittee on Propeller Guards; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety Advisory Council's Subcommittee on Propeller Guards to be held on Monday, November 14, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 9:00 a.m. and ending at 4:00 p.m. The agenda for the meeting will be as follows:

1. Discuss the pros and cons of Propeller Guards.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 88-24551 Filed 10-24-88; 8:45 am]
BILLING CODE 4910-14-M

[CDG-88-087]
National Boating Safety Advisory Council Subcommittee on Universal Registration; Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 1), notice is hereby given of a meeting of the National Boating Safety Advisory Council's Subcommittee on Universal Registration to be held on Monday, November 14, 1988 at the Sheraton Hotel & Marina, 1 Bicentennial Park, New Bern, North Carolina, beginning at 3:00 p.m. and ending at 5:00 p.m. The agenda for the meeting will be as follows:

1. Review materials and formulate a report and recommendation to the Council on universal registration.

Attendance is open to the interested public. With advance notice to the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements should so notify the Executive Director no later than the day before the meeting. Any member of the public may present a written statement to the Council at any time. Additional information may be obtained from Captain William

S. Griswold, Executive Director, National Boating Safety Advisory Council, U.S. Coast Guard (G-NAB), Washington, DC 20593-0001, or by calling (202) 267-0997.

Issued in Washington, D.C., October 17, 1988.

Robert T. Nelson,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
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The National Boating Safety Advisory Council

REPORT
OF THE
PROPELLER GUARD
SUBCOMMITTEE

Presented
November 7,1989

CAPT. James E. Getz, Chairman, State Member
Mr. Donald J. Kerlin, U.S.C.G. Representative
Mr. Richard H. Lincoln, Industry Member
Mr. William D. Selden, Public Member
Mr. Herman T. VanMell, Public Member

REPORT OF THE PROPELLER GUARD
SUBCOMMITTEE OF THE
NATIONAL BOATING SAFETY ADVISORY COUNCIL

I. INTRODUCTION: THE SUBCOMMITTEE AND ITS PURPOSE

At the request of the U.S. Coast Guard, the National Boating Safety Advisory Council (NBSAC) on May 11, 1988, appointed a subcommittee to consider, review and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers. Feasibility of some form of mechanical guard or other action to prevent such contact was to be

examined. A copy of the charge to the Propeller Guard Subcommittee (the Subcommittee) is attached as Appendix A.

The Subcommittee determined that no minutes or transcripts would be kept but that, at the conclusion of its work, all documentary materials received be delivered to the Coast Guard for its files, and that the Subcommittee's final report to NBSAC, together with minority or dissenting statements, if any, stand as the definitive record of its work.

II. INFORMATION OBTAINED

At the outset, the Coast Guard supplied materials from its files to the Chairman, who sent requests to the persons and organizations listed in Appendix B asking for files, data, case histories and other information bearing on the subject. Documents received were copied and distributed to each member of the Subcommittee for study prior to the first meeting. At the conclusion of that meeting, the Subcommittee developed a comprehensive list of further documentation, materials and information to be sought, and of persons to be invited to meet with the Subcommittee. Documents and materials were also volunteered by interested parties. Video tapes and other visual materials were exhibited at the meetings. Appendix C lists all documents received and considered, along with video tapes and visual materials reviewed by the Subcommittee.

III. MEETINGS HELD

The first meeting of the Subcommittee was held at the Boston Whaler facilities at Rockland, Massachusetts, on

September 22 and 23, 1988. Various types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials were presented but not deposited with or retained by the Subcommittee. Members of the Subcommittee also viewed and were given a hands-on opportunity to operate Boston Whaler boats used by the U.S. Marine Corps, one equipped with a "Chadwell" ring-type guard, and the other without.

The second meeting was held in New Bern, North Carolina, on November 14, 1988, and a third meeting at Couer d'Alene, Idaho, on May 12 and 13, 1989. Following that session, the Subcommittee concluded that sufficient written and verbal presentations and demonstrations had been seen and heard to cover the field; collection of documentary material amassed and reviewed was reasonably representative of presently available, relevant data; and further document search or additional meetings with concerned persons was unlikely to produce substantial additional information.

Between the May 1989 and November 1989 NBSAC meetings, this report was drafted and unanimously approved by Subcommittee members, and the Chairman was directed to deliver it to NBSAC at its regular meeting scheduled for November 6, 1989. The Chairman was directed that, following NBSAC action on the report, all documents and other materials collected by the Subcommittee be delivered to the U.S. Coast Guard for its files.

IV. INDIVIDUALS HEARD

The following persons made presentations to the Subcommittee and generally made themselves available for questioning and discussion. Other interested persons attending the meetings are listed in the order of appearance:

1. Richard Snyder: Principle Engineer-Product Evaluation with Mercury Marine. Has testified in behalf of Mercury as Defendant in opposition to guards.

2. Brian Chadwell: designer, manufacturer and seller of ring-type propeller guards. Has testified on behalf of plaintiffs in propeller strike litigation.

3. Ben Hogan: attorney for plaintiffs in such cases and proponent of guards.

4. Donald Blount: civilian naval architect, 34 years with the U.S. Navy, heading the section for design and testing of small boats. Has testified for defendants.

5. Lars Granholm: at one time employed by the Coast Guard as an engineer, currently Director of Industry Safety Standards for the National Marine Manufacturers Association. Has testified for defendants.

6. D.P. Huelke: Professor of Anatomy, University of Michigan, researcher and consultant on trauma injuries, particularly in the automobile industry. Has testified for defendants.

7. Robert Taylor: marine engineer and naval architect, formerly of the University of Michigan and U.C. Berkley [sic], former ship designer for the U.S. Navy, and currently Supervising Marine Engineer of Failure Analysis, Inc. Has furnished statistical data on behalf of defendants.

8. Dr. James Benedict, M.D., Biodynamic Research Corporation, a researcher on effect of traumatic impact on the human body. Has testified on behalf of defendants.

9. Ms. Linda Barnby: victim of a propeller strike injury and advocate of guards. Represented the Florida Audubon Society.

10. Dr. Albert Burstein: New York City's Hospital for special Surgery, a mechanical and biomechanical engineer specializing in sports related injuries and development of protective devices.

Dr. Lawrence E. Thibault, of Biomechanics, Inc. and the University of Pennsylvania, who has testified as a plaintiff's expert biomechanics witness in numerous propeller strike cases, accepted an invitation to participate in, and was scheduled for the Idaho meeting, but failed to appear. (The Subcommittee had previously received a copy of his report and letter dated August 14, 1987, prepared for plaintiff's attorney Stephen R. Bolden in seven of the 19 propeller strike cases described in the report).

In the Subcommittee's deliberations, reports prepared by engineers John G. Hill, Arthur M. Reed and Robert Taggard, in support of plaintiffs in litigation, were reviewed, along with other pertinent documents. (See Appendix C).

V. KEY POINTS COVERED BY VERBAL INPUT AND WRITTEN MATERIALS

1. Litigation

A number of law suits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat. In those cases seeking to hold the engine manufacturer liable, the following legal theories have been asserted by propeller guard advocates:

a. The manufacturer has a duty to design boat propulsion machinery in a prudent manner, which includes a duty to design against hazards, if feasible. Since propeller injuries are a known hazard, and guards are presumed feasible, a manufacturer is negligent and liable for damages (regardless of, or in addition to, liability of the boat operator), for failing to incorporate guards.

b. Alternatively, if no feasible guards presently exist, the manufacturer is nevertheless presumed liable for failure to have funded and conducted whatever research and development may be needed to design and produce effective guards.

c. Guards, in addition to protecting persons, also protect propellers from destructive bottom contact. They are currently feasible and available, and manufacturers should be liable because they choose not to furnish guards in order to profit from sale of replacement propellers.

Advocates have petitioned federal and state legislators and regulators to mandate propeller guards. Such mandate would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them. Feasibility, accordingly, is one of the important questions before the Subcommittee.

In defending "propeller strike" cases, engine and boat manufacturers have asserted:

a. Guards are feasible only at idling or very low speeds and for limited purposes, but are not feasible at normal operating speeds at which the majority of propeller strike accidents occur.

b. A very high percentage of the reported accidents of "struck by boat or propeller" do not involve propeller strikes, but involve impacts with the boat hull or a stationary component of the lower unit.

c. At normal recreational boat operating speeds the increased drag and hydrodynamic characteristics created by known types of guards cause a new hazard by dangerously affecting the handling and stability of the vessel.

d. Since all types of known guards substantially increased the frontal area of the underwater appendages of an engine, the chances that a victim will be hit are greatly increased.

e. A victim hit by other than a very slight glancing blow from the guard on a boat operating at normal or planing speeds, will suffer impact injuries more devastating than being cut by a propeller.

f. The ring-type and wire mesh or "catcher's mask" guards create a new hazard of catching and trapping a victim's limbs resulting in more severe injuries and/or drowning.

g. To recover normal operating speeds lost to guard drag, the engine horsepower and fuel consumption must be raised by at least 50% with consequent and proportionate increases in exhaust emissions.

h. To retrofit the propulsion units now in existence would require the design and manufacture of several thousand different guard models, since each one must be individually designed for the engine to which it is to be fitted. Every unit must be engineeringly modified for the boat hull on which the engine is mounted, to guard against dangerous handling characteristics.

Manufacturers are opposed to mandatory propeller guards and assert that propeller strike accidents constitute less than 5% of the total annual boating fatalities. They assert that safety

efforts and education should address operator incompetence, negligence and alcohol involvement. Improvement in the overall field of safe boat handling would, in the same proportion, beneficially affect the incident of propeller strikes and underwater impacts.

2. Statistical dimensions of the problem

Statistical sources include accident reports filed with the Coast Guard, hospital emergency room sampling by the National Electronic Injury Surveillance System (NEISS), state records, insurance records, and statistical sampling and analysis of selected groups of cases by professional organizations. There are obvious variations in reported statistics. No universally accepted, accurate and complete compilation came to the Subcommittee's attention.

Reports of individual accidents are made at varying times after the accident and may be prepared by the operator, the victim, or an enforcement officer who normally has not seen the accident and must rely on witnesses, if available. Attending physicians in emergency rooms, under the pressure of giving immediate medical or surgical attention, will have difficulty in understanding exactly what happened and in what sequence. Of these people, very few, if any, will have undergone specific training to qualify them as experts in determining the cause of such injuries.

The standard form of boating accident report as prepared by the Coast Guard and followed by many state agencies has one category to be checked under the box "type of accident" identified as "hit by boat or propeller". Such reports, principal

source of statisticians, do not distinguish whether the victim's injury resulted from striking by the boat, the underwater propulsion unit which precedes the propeller (namely, the gear housing, skeg, anti-ventilation plate), or by the propeller, or a combination of all three. (See Figures A and B) The reporting form also does not have a specific space for reporting speed at the time of the accident.

The Coast Guard believes that only 5 to 10% of all boating accidents, not involving fatalities, are reported. The Subcommittee believes that the compilation of accident reporting varies proportionately to the severity of the injury, from nil in the case of very minor injuries, to fairly complete in fatalities.

Although available statistics are imperfect and incomplete, it is probable that the circumstances influencing the preparation and filing of reports remain constant. Thus year-to-year comparisons and trends, particularly as to fatalities, are reasonably informative and valid for the purposes of this inquiry.

In contrast to the obvious deficiencies of accident reporting, statistics on the number and types of boats and engines manufactured and in use can be considered accurate.

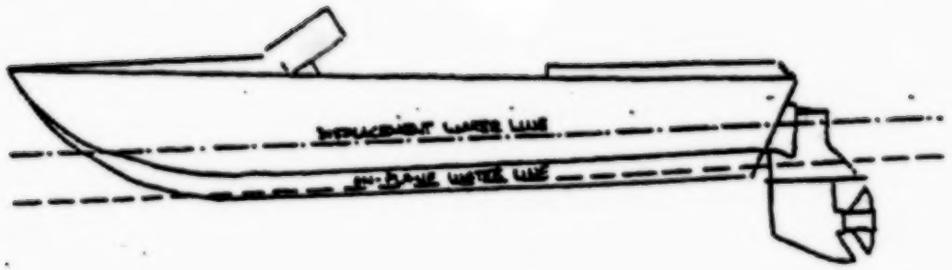


Figure A

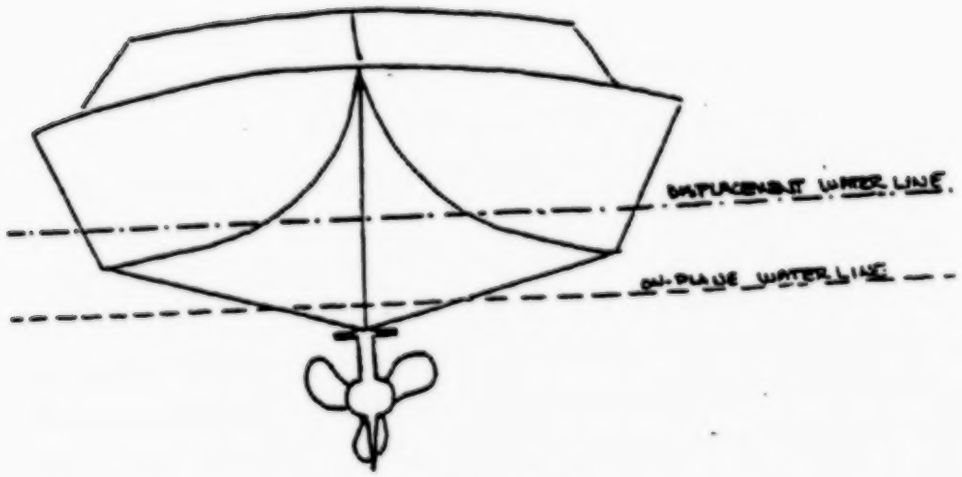


Figure B

The following data was used by the Subcommittee:

Boat population of the United States as of 1988

Horsepower of the engine(s)	number
*None (rowboats, canoes, inflatables)	4,100,000
1 to 5	1,600,000
6 to 10	2,100,000
11 to 30	1,700,000
31 to 50	2,300,000
51 to 100	2,500,000
Over 100 horsepower	2,700,000
	17,300,000

Boat length by feet	
Under 16	9,515,000
16 to 25	7,149,000
26 to 39	568,000
40 to 65	95,000
Over 65 feet	11,000
	17,300,000

*Exception: only occasional use of low horsepower engines.

3. Annual recreational boating fatalities

Robert Taylor of Failure Analysis, Inc. presented information from his organization's data base which had been compiled from all major statistical sources (See Appendix E). Summarizing such statistics for the year 1982: fatality total for recreational boating was 1,183 compared to 1,594 for

swimming pools, 1,900 for firearms (excluding homicide and suicide), 2,800 swimming, 4,453 motorcycles, with motor vehicle fatalities exceeding 43,000. For open motorboats of 14 to 18 feet in length, the contributing factors to fatalities were: falls overboard 35.8%, capsizing 31.9%, collisions 21.2% swamping/flooding 8.9%, and struck by propeller 4.9%.

The calculated risk of fatality in 1982 per each million activity hours of recreational boating was said to be 1.26 for inflatables, 0.62 for canoes/kayaks, and 0.59 for rowboats, in each case with no engine being involved, compared to a risk of 0.14 from all causes for open motorboats (within which the risk of propeller strike itself is a very small fraction). The estimated number of fatalities per million exposure hours in recreational boating (0.14) was compared at the bottom of a list of other recreational activities, with 0.88 in hunting, 1.41 in high school and college football games, 3.08 in scuba diving and 17.34 in private flying.

Water skiing was considered a special risk in itself (separate from the category of recreational boating) and, according to Failure Analysis data, accounted for some 40 annual fatalities (only a portion of which were propeller strikes). It is estimated that over 14,000,000 persons participated in water skiing annually.

4. How propeller strike accidents occur

In almost all cases the victim is in the water, as a swimmer, snorkeler or scuba diver, a downed water skier, or more frequently, as a result of falling or being thrown from a boat. While some victims have been struck by propellers in the

air in accidents where one vessel collides with and passes over another vessel, such incidents appear to be rare.

Passengers moving about or improperly seated, such as "bow riders", or persons sitting on the gunwales or transom, are ejected by sharp turns, wave or wake bounces, all at speeds which may be too fast for the prevailing conditions. Persons also are ejected from boats by collisions with another vessel or fixed object. Operator inexperience, incompetence, negligence; and alcoholic intake are significant contributing factors in reported "propeller strikes" as well as in other kinds of boating accidents. Ejections can also be caused by sudden acceleration or deceleration, either from operator error, equipment failure or malfunction, or striking masses of weeds or other submerged objects.

Presentations illustrated that approximately 80% of all accidents occur when a boat is operating at speeds in excess of 10 miles per hour, i.e. normal operating or planing speeds. Accidents occurring at idling or slow speeds (2 to 10 miles per hour) most typically appear to happen when the operator is in the process of picking up a fallen water skier, moving in the vicinity of swimmers, or inadvertently putting an engine in gear when swimmers are using a boarding ladder or platform.

5. Types of propulsion

The most common propulsion unit used is the outboard motor, mounted on the stern of a boat and rotated to steer of the boat. Second is the inboard/outboard device, powered by an engine mounted inside the boat, with an exterior drive unit containing a gear case and propeller, which is moved from side

to side to steer the boat. In both cases, the lower unit, including the propeller, serves as the rudder in steering the boat.

A third common means of propulsion is an engine mounted in the boat to power a shaft passing through the hull, and generally through a supporting strut, at the end of which the propeller is mounted. Such boats are steered by one or more separate rudders and may be either planing or displacement boats. Included in displacement boats are sailing vessels with inboard mounted engines and a shaft through the hull, sometimes off-center and sometimes on center line, with a cut out or other space between the shaft and a rudder. Such auxiliary sail boats commonly travel at speeds, when under engine power, well below 10 mph. Many small sailboats use low power outboard motors for auxiliary propulsion at low speeds. Auxiliary powered sailboats did not figure in any propeller strike accidents coming to the Subcommittee's attention.

In a fourth propulsion method, water is taken in through a submerged scoop and ejected by an impeller as a high speed jet of water pushing astern. A steering rudder may be required. Outboard jet engines have appeared on the market in recent years, particularly for fishing in very shallow water. Manufacturers state that jet drive outboards are 25% less efficient than comparable horsepower propeller driven outboards. In traditional boat types, jet propulsion units do not appear to have succeeded commercially. This has not been the case, however, with "personal watercraft". This jet-driven type of boat is increasingly figuring in accident and fatality statistics through collisions with other vessels or with swimmers in the water and operators falling in the vicinity of other craft.

6. Propeller guard designs and availability

Although many variations have been conceived and patents granted, there are essentially only three basic configurations of "propeller guards".

First is a ring band device commonly secured to the submerged portion of an outboard motor or stern drive unit and within which the propeller revolves. Unless supplemented by sufficient bars or mesh across the rim front and back, fingers, hands, arms, etc., can enter the ring and contact the propeller. Proponents of guards assert that most victims are struck at an angle to the boat, rather than frontally; that a boat in motion creates a pressure valve tending to push bodies to the side; and, therefore, that in most impacts a victim would receive only a minor glancing blow from a guard. As to frontal hits with a guard in place, it is asserted that the leading edge of the ring could be constructed of crushable material to absorb the energy of the impact, or be cushioned with flexible material covering metal or plastic parts, thus preventing serious injury to the struck victim.

Opponents assert that a blow from a guard, either frontally or at an angle from a boat traveling at speeds of over 6-10 miles per hour or any boat at planing speed, could cause serious or fatal impact if hitting the head or chest; that at such speeds a human body in the water is held stationary relevant to the striking force, and there is no wave effect pushing bodies to the side. Also, there is no known material available which, as a part of a propeller guard, could absorb energy on impact with the human body in water and maintain its shape and structural integrity under normal use. Opponents further assert that this

guard significantly increases the total area of possible underwater impact.

The second general type of guard is a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires. Some patents show bars forward of the propeller, some vertical, some horizontal or combinations. To maximize protection, mesh must be small enough to prevent insertion of limbs and/or appendages and totally encompass the propeller. The mask device also significantly increases the total area of possible underwater impact. In the use of both the ring and the mask-type guards, opponents have stressed that the frontal impact area would be increased by three times by attaching the guard (See Figure C). They further contend that, while a submerged body limb may not be struck by the rotating blades of the propeller, they would certainly be struck by the guard, if the limb were in the path of the lower unit.

A third type is shrouding the propeller in a tunnel or tube, and in its most common application is referred to as the Kort nozzle. This was designed to control water flow to and through a propeller to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships. Vanes can be inserted in both the forward and aft ends of such nozzles to direct the flow of water for maximum efficiency and serve as barriers to the entry of body parts.

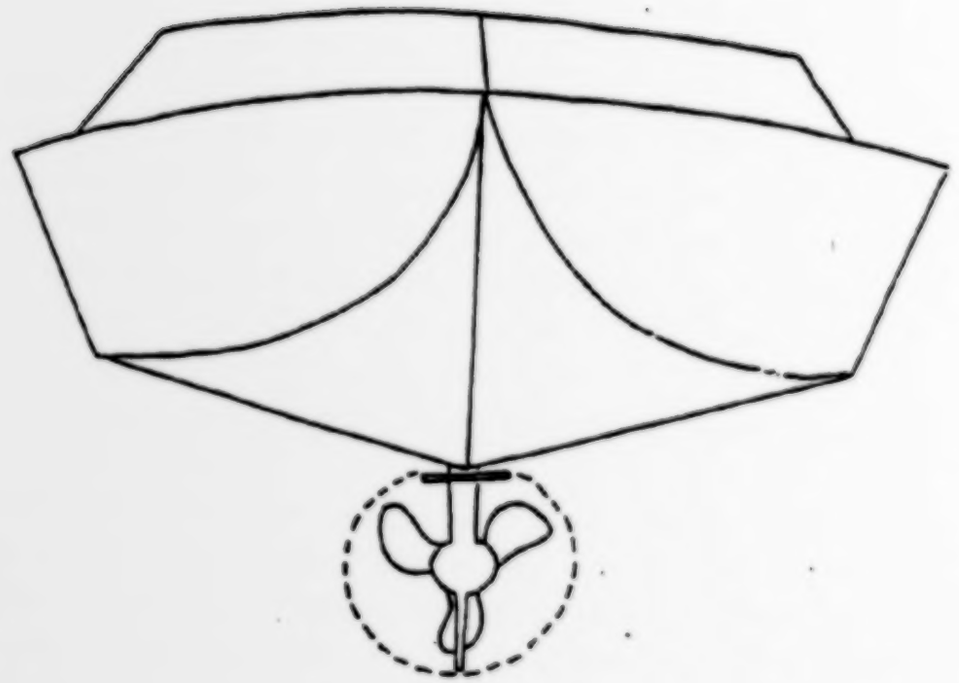


Figure C

Examples of the ring and mask types of guards were examined by the Subcommittee. No example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee. No guard device suitable for inboard engine drive propellers on displacement or planing motor boats, or on auxiliary sail boats was present.

7. Present use of guards

Fine mesh cage guards have been used for many years on amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible. Also, a blow to a person in the water at such very slow speeds has minimal effects. No evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds.

The mask guard with spaced rods is used in various parts of the world on rescue boats, often on inflatables, powered with 25 or more horsepower engines. In the typical rescue operation, the boats speed to the rescue scene and then operate at slow or idle speed while carrying out the rescue. The wide spacing of the bars required to minimize critical drag in speeding to the rescue scene does not prevent entry of body appendages.

It was reported that approximately 2,000 of the "Chadwell" ring-type guards have been sold, with some used on rescue boats in Australia and New Zealand and California. Some boats used by the U.S. Marines have been equipped with these guards. The intended use is to deposit Marine personnel

in the surf and then stand off-shore to await their recovery. In this simulated combat situation, it is critical to keep the motors operating, while also affording a certain degree of protection to personnel in the water. The Subcommittee understands that the U.S. Marine Corps is undertaking additional, more extensive study on the use of different types of guards. The U.S. Navy makes limited use of guards (although it was not stated whether they were rings or masks) to minimize entanglement of diving hoses on some boats used as diving platforms. The Navy has used "nozzle shrouds" around propellers of landing boats operating from well decks on the mother ship to move cargo and personnel ashore. This usage has a prime objective of protecting propellers from mechanical damage in striking the bottom of the well deck or submerged objects on the beach, while achieving high thrust at low speeds for more efficient operations.

8. Mechanical and hydrodynamic problems inherent in guards

It is clearly demonstrated that the ring-type guard creates severe steering and trim effects which cause serious safety and control problems. In the demonstration of the Boston Whaler boat equipped with a ring-type guard, the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result. Rings and their mounting devices increase drag with corresponding loss of speed.

An engineer for one of the engine manufacturers described experimental work done for the Marine Corps on a mask guard

which would have less severe steering and trim hazards than a ring guard and was expected to be less subject to critical damage on hitting bottom or submerged objects. The first cage, built of 5/16" diameter steel rod stood up structurally, but its drag reduced boat speed from 35 mph to 19 mph (when compared to use without a propeller guard). The second, built of 1/4" diameter steel rod more widely spaced solved steering but not drag problems, and vibration forces broke the welds. The added drag due to this mask or cage reduced boat speed from 37 mph to 27 mph (with two 70 horsepower engines). It was stated that, to regain the desired speed of 37 miles an hour, horsepower would have to be increased 100% to a total of 280. It was also found that the mask, as well as the ring-type guards, was vulnerable to crushing on hitting the bottom, pushed down by the weight of the boat bouncing in the waves, with consequent disablement of the engine. It was further stated that the objective of simultaneously protecting the propeller from damage, protecting landing personnel, and making no material sacrifice of speed involved irreconcilable physical laws and an insoluble manufacturing dilemma. To make the guard strong enough to withstand hitting the bottom or hard object resulted in unacceptable drag and handling – and to conserve desired speed, steering control and prevent entry of body appendages the guard would have to be so lightly constructed that it could not stand up to normal operating loads.

9. Biomechanical considerations

The density of water is approximately 830 times that of air. The density of the human body is approximately the same as water. Therefore, it follows that a human body immersed in water cannot move independently of the water around it. The

result of an object striking a human body in the water is that the body absorbs most of the energy of the striking object. As the speed of a striking object increases, the transferable energy increases by the square of that speed, and the force of the blow becomes correspondingly greater. The resistance force on body movement in water at 1 mile per hour is the same as a force of 29 mph in the air. It was repeatedly stated that a skull impact at 10 mph or more in the water would be generally fatal. A glancing head blow twisting the neck could result in a sheared neck at such speeds, and a chest strike could result in rib flexing in an unsustainable amount. Even with an idealized cushioning material, not currently known to exist, head or body cavity strikes at speeds over 10 mph could likely be fatal.

The auto industry and independent researchers have an extensive data bank resulting from numerous crash tests using technically sophisticated, instrumented manikins, from which generally accepted tables have been constructed concerning the forces which result in serious and fatal injuries. Although there are no such completed studies available regarding underwater impacts, tests have been conducted which reveal significant similarities. Video films of boats striking simulated limbs, surgically comparable to human limbs, and other submerged objects illustrated the injury-causing forces involved when an 18 to 25 foot boat, weighing up to thousands of pounds, traveling at speeds varying from 10 to 35 mph hits a body or object.

The human body has numerous rotational joints, i.e. the neck, wrists, fingers, elbows, ankles, etc. All are subject to serious and permanent injury depending on the force and mass involved in the impact. An oblique strike by an underwater

appendage can result in rotational injury or injury transmitted to another part of the body. According to Failure Analysis data, sports trauma, such as high school and college football, has nine times the fatality risk of recreational boating. This data reinforces the premise that serious or fatal injury can result from even relatively low speed and/or mass impact depending on the angle of the striking force and the location of the impact.

Propellers present the hazard of cutting wounds and penetrations of the body, while other underwater appendages, including guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe.

It was stated that at a speed of 10 miles an hour, any fixed appendage of a boat (example: the skeg of an outboard motor) crosses a submerged limb in 1/50th of a second. With the water holding the limb relatively immobile, the limb tissue is torn, then the bone is crushed, producing a wound more serious than propeller cuts. Due to its revolutions, a propeller generally produces a series of evenly spaced cuts which are relatively easier to repair surgically.

All machinery or objects, whether created by man or nature, can inflict injury. It is impossible to make everything totally free of hazard. At a cost, we can be protected against many hazards. Most of the annual 43,000 motor vehicle fatalities, for example, could probably be prevented by mandating a national speed limit of 10 mph. The economic and social cost, however, would be unacceptable.

By definition, a guard must both diminish a hazard and leave the object capable of normal function, at a cost which is reasonable in proportion to the extent of the hazard. Diminishment of hazard is classically accomplished by various means, including barriers, shut down devices, warnings, and education for safe use. Above all, it is fundamental that a guard should not create a condition which leads to a new or worse hazard.

VI. SUMMARY

Up to 80% of underwater impact accidents occur at normal operating speeds, in excess of 10 mph and more usually in the 13 to 35 mph rate. The craft most typically involved is in the 15 to 25 foot range, powered by an outboard or inboard/outboard unit or units of 25 horsepower or more. This also is the bracket where the great majority of all accidents involving powered vessels occurs. Recent data reveal an increasing level of involvement of personal watercraft in boating accidents. The risk of accident increases during water skiing activity.

Nevertheless, boats and motors should be designed to incorporate technologically feasible safety features to avoid or minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk.

Proponents assert that propeller guard technology and/or availability meets the foregoing criteria and that guards should

be mandated. The Subcommittee does not agree and offers the following comments:

1. The concept of mask and ring-type guards is feasible at idling and very low speeds. Fine mesh guards can prevent propeller contact but are not feasible above 2-3 mph, which rules them out for recreational boating. Masks with wide mesh or spaced bars and ring guards may prevent cuts from body contact with a propeller but substitute the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to ascending serious risk of fatality as speeds increase. In recent accident reconstruction training exercises, it has been demonstrated that boats and their appendages can easily be construed as projectiles. Boats operating at planing speeds can easily penetrate or cause serious damage to other boats. These demonstrations serve to reinforce the damage potential of boat impacts with persons in the water. Either guard presents an underwater profile of significantly larger frontal area, thereby increasing the chances of contact. In the case of the ring-type guard, a new hazard is created, in that an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller. Operators of a "guard-equipped" boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage.

2. At speeds of approximately 10 mph or greater, both types of guards – especially the ring – affect boat operation adversely. Both guard types result in drag increasing proportionally to the square of speed, resulting in substantial power and speed loss. This will require greatly increased power and fuel consumption to regain the lost speed.

3. Propellers encased in the Kort nozzle, or tunnel, substitute impact for propeller cut hazard, have rapid loss of efficiency above 10 mph and are not operationally feasible at normal pleasure boat speeds. The Kort nozzle is viewed as a low speed efficiency enhancer and not a guard.

4. Water jet propulsion eliminates the propeller and diminishes the underwater appendage impact area, but at a minimum 25% loss in efficiency and results in newly created operational handling problems.

5. No known materials are available to construct "soft" propellers or to construct or coat guards so as to absorb impact energy and prevent injury, yet maintain structural integrity and serve the intended purpose.

6. Adequate seat belts, if used by all boat passengers, could prevent some operator and passenger ejections into the water. A belted person involved in a capsizing, however, would then be subject to the risk of death by drowning.

7. Any guard would have to be both hydrodynamically and structurally compatible with the intended propulsion unit. Further, guards must not only fit the motor but be designed for hydrodynamic compatibility with the hull on which the motor is used. Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

8. The suggestion that guards should be mandated, at least for water ski boats during which activity accidents occur at both high and very low speeds, and for boats equipped with swimming platforms and ladders, presents other problems. Water skiing or swimming from a boat is a part-time and limited activity and does not describe a boat type. Recreational boats are multi-purpose in nature, which precludes the practicality of an off-on use of a propeller guard. If guards were readily removable, automotive experience clearly shows that they would be by-passed by permanent removal. The Subcommittee feels that it is not practical or feasible to mandate guards for specific uses, such as water skiing or while a boat is being used as a swim platform. Furthermore, the removal of a guard could

result in inadvertent or intentional overpowering of the boat.

CONCLUSIONS

1. Accident data and the analysis of accident data must be an integral component of a study of this nature. There is no one single source, best source, or all-inclusive source of accident data. However, the available sources can be utilized collectively to give an accurate portrayal of the significance, frequency, and relative magnitude of underwater impacts to other causes of boating accidents in particular and accidents in general. There is no indication that any change in reporting would reflect significant changes in the relative position or percentage of injuries/fatalities due to underwater impacts. Therefore, propeller guarding at best could have only a negligible impact on improving boating safety.

2. Injuries/fatalities caused by underwater impacts result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counter-productive and can create new hazards of equal or greater consequence.

3. Operator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities. Mandatory equipment requirements could be

expected to have only a negligible impact on this problem. The most rational approach to the problem is to educate boaters, especially operators. They must be made to understand the abilities and limitations of their equipment. They must be aware of and understand the hazards their boat can cause to people in the water. Above all, they must be made to understand the consequences of careless or negligent operation of their watercraft, and how they, as boat operators, can act to prevent accidents.

4. Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

RECOMMENDATIONS

1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

3. The U.S. Coast Guard should implement necessary steps to have included in the national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Unanimously adopted by the
Propeller Guard Subcommittee

by /s/ James E. Getz
James E. Getz, Chairman

for: Donald J. Kerlin
Richard H. Lincoln
William D. Selden
Herman T. VanMell

APPENDICES

APPENDIX A .... Charge to the Subcommittee

APPENDIX B .... List of Subcommittee Contacts

APPENDIX C .... List of Documents and Materials Reviewed

APPENDIX D .... Subcommittee Agendas

APPENDIX E .... Failure Analysis Associates Summary

APPENDIX F .... Subcommittee Members

APPENDIX A

Charge to the Subcommittee

APR 13 1988

NBSAC COMMITTEE

Propeller Guards/[Propeller Strikes/Propeller Protection]

Charge to the Committee:

- Review the available data on the prevention of propeller-strike accidents and Coast Guard study of various methods of shrouding propellers to prevent contact with person in the water.

- Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

- Among points to be considered:

  a. what is the incidence of such accidents?

  b. is there a trend toward more or fewer such accidents?

  c. what are the possible solutions and their advantages/disadvantages?

  d. how is this problem being addressed in other nations?

  e. what would be the direct costs and indirect costs (fuel economy, maintenance, etc.) of mechanical solutions?

  f. can the risks be addressed adequately by education?

  g. should the Coast Guard move towards a federal requirement for some form of propeller guard?

h. assess the potential for propeller equipped with each of several propeller guard designs to cause injury. How much has the propeller guard reduced the injury potential compared to the injury potential of the same propeller operating in an unguarded manner?

i. should only new boats and motors be equipped with propeller guards, or should all boats eventually be equipped with a guard?

j. what is the practical boat length limit beyond which propeller guards would not be required? are there other parameters which would dictate upper limits for guard installation?

Committee members:

Jim Getz (Chairman)
William Past
Dick Lincoln
Don Elison (USCG rep.)

APPENDIX B

List of Subcommittee Contacts

The following list represents the contacts made in behalf of the Subcommittee requesting information relevant to the Subcommittee's charge:

Dr. James Benedict, PhD., M.D.
Biodynamic Research Corporation
9901 IH 10 West
San Antonio, Texas 78230

Mr. Donald L. Blount, P.E.
Head, Combatant Craft Engineering Department
Naval Sea Combat Systems Engineering Station
P.O. Box 10418
Norfolk, Virginia 23513

Mr. Steve Bolden
Fell & Spaulding
211 South Broad Street, 8th Floor
Philadelphia, Pennsylvania 19017

Dr. Albert H. Burstein, PhD.
Director
The Hospital For Special Surgury
Department of Biomechanics
535 East 70 Street
New York, New York 10021

Mr. Brian Chadwell
Prop Guard, Inc.
1901 Shelter Island Drive
P.O. Box 6276
San Diego, California 92106

Dr. Michael Gallery, PhD.
Emergency Medical Foundation
Box 619911
Dallas, Texas 75261

Mr. Lars Granholm
Director, Technical Services
National Marine Manufacturers Association
401 North Michigan Avenue
Chicago, Illinois 60611

Director
Emergency Room Services
Falmouth Hospital
Ter Heun Drive
Falmouth, Massachusetts 02540

Director
Emergency Room Services
Jordan Hospital
275 Sandwich Street
Plymouth, Massachusetts 02360

Director
Emergency Room Services
Lakes Region General Hospital
Highland Street
Lanconia, New Hampshire 03246

Director
Emergency Room Services
Quincy City Hospital
114 Whitwell Street
Quincy, Massachusetts 02169

Director
Emergency Room Services

Salem Hospital
81 Highland Avenue
Salem, Massachusetts 01970

Executive Director
International Rescue and Emergency Care Association
8107 Ensign Curve
Bloomington, Minnesota 55438

Mr. Dennis Heussner
National Life Saving Director
Surf Life Saving Association of Australia
'Surf House', 128 The Grand Parade
Brighton-le-sands, N.S.W. 2216, Australia

Mr. John G. Hill
Naval Architect - Marine Engineer
P.O. Box 114
Oxford, Maryland 21654

Mr. R. Ben Hogan, III
Hogan, Smith, Alspaugh, Samples & Pratt, P.C.
2323 Second Avenue North
Birmingham, Alabama 35203-3758

Dr. Donald F. Huelke, PhD.
The University of Michigan
Transportation Research Institute
2901 Baxter Road
Ann Arbor, Michigan 48109-2150

Dr. Jack C. Hughston, M.D.

Editor
American Journal of Sports Medicine
428 East Preston Street
Baltimore, Maryland 21202

Mr. Alex B. Marconi
Senior Counsel/Litigation
Outboard Marine Corporation
100 Sea Horse Drive
Waukegan, Illinois 60085

Ms. Francis Munnings, Executive Editor
"The Physician and Sportsmedicine"
McGraw-Hill Healthcare Group
4530 West Seventy-Seventh Street
Minneapolis, Minnesota 55435

Mr. Arthur M. Reed
9106 Warren Street
Silver Springs, Maryland 20910-2140

Mr. Richard H. Snyder
Principle Engineer - Product Evaluation
Mercury Marine
W6250 West Pioneer Road
P.O. Box 1939
Fond Du Lac, Wisconsin 54936-1939

Mr. Robert K. Taylor, P.E.
Managing Engineer
Naval Architecture & Marine Engineering
Failure Analysis Associates, Inc.

2225 East Bayshore Road
P.O. Box 51470
Palo Alto, California 94303

Dr. Lawrence E. Thibault, Sc.D.
Biomechanics, Inc.
1611 Valley Greene Road
Paoli, Pennsylvania 19301

APPENDIX C

List of Documents and Materials Reviewed

The following is a listing of the documents and materials reviewed by the Subcommittee:

"Prediction of Whole-Body Response to Impact Forces in Flight Environments," by Ints Kaleps, a paper reprinted from the Conference Proceedings No. 253, Models and Analogues for the Evaluation of Human Biodynamic Response, Performance and Protection, North Atlantic Treaty Organization.

"Water Jet Propulsion - Competition for Propeller?," by Ralph E. Lambrecht, Society of Automotive Engineers, Automotive Engineering Congress, No. 740283, February 25-March 1, 1974.

"Review of the State of the Art of Swimmer Protection from Outboard Propellers," by Robert Taggart, 16 February 1979.

"Waterskiing Injuries," by Larry R. Pedegana, M.D., and Janice Lang, The Physician and Sportsmedicine, Vol. 7, No. 6, 1979.

"Propeller Injuries Incurred in Boating Accidents," by Ronald J. Mann, M.D., The American Journal of Sports Medicine, Vol. 8, No. 4, 1980.

Unpublished letter to Mr. Al Marmo, U.S. Coast Guard from Mr. Dick Snyder, Mercury Marine, reference propeller guards, dated December 15, 1980.

"Waterskiing-Related Injuries," by Gregory Hummel, M.D., and Barry J. Gainor, M.D., The American Journal of Sports Medicine, Vol. 10, No. 4, 1982.

"Hi-Performance Boat Operation," a booklet published by Brunswick Corp., No. 90-86168 3-184, 1984.

"Steering/Struck-by-Propeller Accident Study, 1983 Recreational Boating Accidents," by Gary Traub, U.S. Coast Guard G-BP-1, December 18, 1984.

Surf Life Saving Training Manual, issued by the Surf Life Saving Association of Australia, 27th Edition (Revised), 1985.

Inflatable Rescue Boat Training Examination and Operations Manual, issued by the Surf Life Saving Association of Australia, Third Edition, 1986.

Coast Guard Memorandum to Chief, Marine Safety Technology Branch, from Chief, Medical Operations Branch, reference Mercury Marine tests, dated June 2, 1986.

"Everything You Need to Know About Propellers," a booklet published by Brunswick Corp., No. 90-86144, Third Edition, 1987.

"The Technological Feasibility of Propeller Guarding for Pleasure Planing Craft," by John G. Hill, February 10, 1987.

"Boat and Propeller Impact Injuries and Fatalities," Project 763584.20 Final Report, by Edward S. Purcell and Walter B. Lincoln, U.S. Coast Guard Research and Development Center, 1 March 1987.

"Motorboat Propeller Injuries," by Charles T. Price, M.D., and Charles W. Moorefield, M.D., The Journal of the Florida Medical Association, Vol. 74, No. 6, June, 1987.

"The Feasibility of Propeller Guarding," by Arthur M. Reed, July, 1987.

"Propeller Guarding," a letter report by Lawrence E. Thibault to Mr. Stephen R. Bolden, Esq., dated August 14, 1987.

"Principles of Human Safety," by Ralph A. Barnett and William G. Switalski, Safety Brief, Vol. 5, No. 1, Tiodyne, Inc., February, 1988.

Letter to CAPT. Roger T. Rufe, Chief, Congressional Affairs Staff, U.S.C.G., from The Honorable Orrin G. Hatch, United States Senator, reference Mr. Jackson Howard's concerns about propeller guards, dated March 28, 1988.

Letter to The Honorable Orrin G. Hatch, United States Senator, from the Coast Guard responding to Mr. Howard's concerns, dated April, 1988.

Letter to Mr. James D. Martin, Alabama Commissioner of Conservation and Natural Resources, from Mr. R. Ben Hogan, III, reference propeller guarding, dated April 11, 1988.

Letter to Mr. Al Marmo, Chief, Policy Planning and Evaluation Staff, U.S.C.G., from Mr. R. Ben Hogan, III, reference propeller accidents in Alabama, dated May 5, 1988.

Letter to Subcommittee Chairman Getz from Mr. Lars Granholm, National Marine Manufacturers Association, reference 1979 Coast Guard study, dated May 31, 1988.

"Specification Criteria for the Manufacture, Testing & Commissioning of Safety Guards for Use on Inflatable Rescue Boats Engaged in Inshore Rescue Activities, and Schedule of Approved Guards," Bulletin No. 504-88, The Surf Life Saving Association of Australia, National Council, May, 1988.

Slide photographs of various guard devices, components of lower units, and tests submitted by Mr. Richard Snyder, Mercury Marine, submitted August 12, 1988.

Struck by Boat or Propeller manual analysis of 1983-1987 Coast Guard data by Subcommittee member Kerlin, dated September 22, 1988.

Letter to Subcommittee Chairman Getz from Mr. Donald L. Blount, P.E., reference a summary of his presentation to the Subcommittee on September 22, dated October 1, 1988.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference propeller guarding information, dated October 6, 1988.

Letter to Subcommittee Chairmann [sic] Getz from Mr. Dick Snyder, Mercury Marine, reference a summary of his presentation to the Subcommittee on September 22, dated October 6, 1988.

Collection of propeller guard patents, compiled by Subcommittee member Montgomery, dated October 18, 1988.

Letter to Subcommittee Chairman Getz from NBSAC Chairman Garden, reference NEXUS data bank of published newspaper articles concerning propeller-related accidents, dated October 23, 1988.

Letter to Subcommittee Chairman Getz from Mr. Alex Marconi, OMC Senior Counsel/Litigation, reference response to the article "Motorboat Propeller Injuries" by orthopedic surgeon John Nordt, M.D. of Coral Gables, and other related matters, dated November 9, 1988.

Letter to Subcommittee Chairman Getz from Dr. D.F. Huelke, reference a summary of his presentation to the Subcommittee on November 14, dated December 19, 1988.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference his updated article on propeller guarding, dated January 23, 1989.

Letter to Subcommittee Chairman Getz from Mr. Dick Snyder, Mercury Marine, reference a clarification of his presentation to the Subcommittee on Sptember [sic] 22, 1988 concerning USCG statistics, dated February 23, 1989.

Photographs of Dr. Thibault's Deposition Exhibits, OMC ATS Glabman, April 13, 1989.

Letter to Alex Marconi, OMC Senior Counsel/Litigation, from Kelly J. Flood, reference transcripts of Swint and Bruton San Diego Test videos, dated April 17, 1989.

Personal Watercraft Accident Summary, compiled by Subcommittee member Kerlin, dated May 9, 1989.

Letter to Subcommittee Chairman Getz from Mr. Richard Snyder, Mercury Marine, reference a summary of his work

with the U.S. Marine Corps delivered at the May Subcommittee Meeting, dated May 30, 1989.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference August 9, 1989 stunt man prop guard tests, dated August 11, 1989.

Letter to Admiral Paul A. Yost, Commandant, U.S. Coast Guard, from Mr. Benjamin Kelley, President, Institute for Injury Reduction, reference the Institute's recent news conference and subsequent questions for the Coast Guard, dated August 15, 1989.

Letter to Mr. Benjamin Kelley, President, Institute for Injury Reduction, from Captain W.S. Griswold, U.S. Coast Guard, responding to Mr. Kelley's August 15, letter to Admiral Yost, dated August 23, 1989.

Letter to Subcommittee Chairman Getz from Mr. R. Ben Hogan, III, reference video tapes of a deposition of Dr. Charles Price (08/29/89), propeller guard segment on "CBS This Morning" (08/31/89), and prop guard demo (08/09/89).

Letter to Subcommittee Chairman Getz from the Biodynamic Research Corporation, reference an outline of Dr. Benedict's presentation to the Subcommittee in May, dated September 20, 1989.

Video Tapes, as follows:

Simulated Underwater Limb Impact Tests (SULIT), Mercury Marine, 1988, (21 min.)

Hirsch, Glover, Robinson & Sheiness, Hammonds vs. Yates, Marine Corps Raiders, (4 min.), Guard Operation by Snyder, (4 min.), Mercury and OMC Log Jumps, (4 min.), Ehrhardt Cage Test "Wynne", (6 min.).

Simulated Underwater Flesh Impact Test (Sausage Tests), Mercury Marine, (5 min.).

Chadwell Propeller Device On-Water Tests, Mercury Marine, (8 min.).

Sporting Life IRB's New Zealand, (25 min.).

March 1989 San Diego Texts, and March 1989 San Diego Tests, Bruton Tapes, Underwater Video, High Speed Film, Speed Runs.

Institute for Injury Reduction news conference release tape, propeller injuries/propguards, June 1989.

Ben Hogan/stunt man propeller guard tests, conducted August 9, 1989 (2 tapes).

Deposition of Dr. Charles Price, dated August 29, 1989.

Propeller guard segment of "CBS This Morning," dated August 31, 1989.

APPENDIX D

Subcommittee Agendas

PROPELLER GUARD SUBCOMMITTEE MEETING
BOSTON WHALER FACILITIES – ROCKLAND, MA
SEPTEMBER 22 & 23, 1988

AGENDA

Thursday, September 22

8:30 AM - 9:50 AM	Subcommittee Welcome, Orientation, and Literature Review
10:10 AM - 11:00 AM	Presentation to the Subcommittee Mr. Richard Snyder – Mercury Marine
11:10 AM - 12:00 PM	Presentation to the Subcommittee Mr. Brian Chadwell – Propeller Guard Designer
1:00 PM - 1:50 PM	Presentation to the Subcommittee Mr. Ben Hogan – Attorney for Advocates

2:00 PM - 2:50 PM — Presentation to the Subcommittee Mr. Alex Marconi – Attorney for Outboard Marine Corp.

3:10 PM - 5:00 PM — Participation with the Subcommittee Previous participants will give points, counterpoints, rebuttals to other presentations, in addition to questions/ answers with the Subcommittee

Friday, September 23

8:30 AM - 10:00 AM — On-water propeller guard demonstration Boston Whaler representatives will provide a boat with and without a propeller guard

10:20 AM - 12:00 PM — Subcommittee review of newly presented information and plans for the future needs of the subcommittee, with a projected timetable for subcommittee work

PROPELLER GUARD COMMITTEE MEETING
NEW BERN, NORTH CAROLINA
NOVEMBER 14, 1988

AGENDA

1. Presentation by D.F. Huelke, Professor of Anatomy, University of Michigan

2. Review of papers submitted by previous speakers.
   Blount
   Hogan
   Snyder

3. Review of Garden letter, dated October 23, 1988, Re: Nexus.

4. Review of Committee Charges from September Meeting.

   Getz ..... Capt. Griswold letter
   Dr. Thiebault

   Kirlin ..... U.S.C.G. Statistical Analysis
   Consumer Product Safety Commission
   David Taylor Model Basin

   Mongomery . Patents
   Lexus
   Insurance Carriers

   Lincoln ..... Robert Taylor Graphs

5. Future Committee Schedule.

PROPELLER GUARD SUBCOMMITTEE MEETING
COEUR D'ALENE, IDAHO
MAY 12 & 13, 1989

AGENDA

Friday, May 12

1:00 - 1:10 PM	Review by Subcommittee Chairman
1:10 - 1:30 PM	Presentation to the Subcommittee Mr. Richard Snyder – Mercury Marine
1:30 - 3:00 PM	Presentation to the Subcommittee Mr. Robert Taylor – Failure Analysis, Inc.
3:15 - 5:00 PM	Presentation to the Subcommittee Dr. Lawrence Thibault – Biomechanics, Inc.
7:00 - 9:00 PM	Presentation to the Subcommittee Dr. James Benedict – Biodynamic Research Corporation

Saturday, May 13

8:00 - 10:00 AM	Presentation to the Subcommittee Dr. Albert Burstein – The Hospital for Special Surgery
10:00 - 5:00 PM	Subcommittee Review/Report Assignments

APPENDIX E

Failure Analysis Associates Summary

August 2, 1989

Captain James E. Getz, Chairman
Propeller Guard Subcommittee
National Boating Safety Advisory Council
Illinois Department of Conservation
110 James Road
Spring Grove, IL 60081

RE: Boating Accident Statistics

Dear Jim:

I am sorry, but I become busy and forgot to send you hard copies of some of the material pertinent to my Propeller Guard Subcommittee presentation. Enclosed are several charts showing accident (Fatality and Injury) statistics reflecting general activities, boating, and incidents involving being struck by "boat, propeller, or lower unit." Following are some comments regarding each chart.

Chart 1 "Accident Types" for Fatal Accidents for
Boats with Motors 1976-1981

The average number of recreational boating deaths from 1976-1981 is 1,325 per year. Of all fatal accidents for boats with motors 5.2% of the accidents involve being "struck by boat or propeller."

For the years presented, this amounts to an average of 49 fatalities per year associated with this accident mode. We know this number is higher than actual because we cannot subtract the subset "related to propeller contact" from those accidents where the individual was struck by only the boat or only other motor or steering appendages and not by the propeller. Estimates show that boating fatalities involving the propeller are probably closer to 30 per year.

Chart 2 Annual Fatalities

This chart indicates annually there are approximately two million deaths. The great majority of those deaths are associated with natural causes and disease. Only 5% of all deaths are premature accidental deaths. Nearly half of all accidental deaths involve motor vehicles. One percent of accidental deaths (1384 in 1980) are attributable to boating. Of these, approximately 30-49 incidents per year are associated with propeller involvement. On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning (94 in 1981).

Chart 3 Risk of Fatality by Activity

This bar chart depicts the relative comparative risk of fatality for various activities. Risk is computed by dividing the number of fatalities for a given activity or accident mode by the opportunities for the accident to occur. In this case, the opportunity is selected as one million exposure hours. An exposure hour is defined as one person spending one hour in pursuit of the activity. In other words, this chart shows the relative risk (or chance of fatality) for different activities if one

spent an equal amount of time (million hours in this case) in pursuit of that activity.

The risk of fatality on a per hour basis while boating, in general, is about one-fourth the risk of operating a motor vehicle and is comparable with the risk of flying in a domestic scheduled airline.

The risk of fatality of being "struck by boat or propeller" is one-third of the risk of traveling in a school bus for an equal amount of time.

Chart 4 Risk of Boating Fatality in 1981

This chart indicates that all boat types do not have the same relative risk of fatality. In fact, boats without motors (inflatables, rowboats, and canoes/kayaks) tend to be substantially more risky than boats with motors.

Chart 5 Rate of Boating Fatalities In Which the Accident Was Described As "Struck by Boat or Prop" 1975-1981.

This chart shows that even motor driven boats without external propellers (jet boats) are involved, on a per-boat basis, in a comparable number of "struck by boat" incidents.

Obviously, this fact demonstrates that in the real world there is no free lunch. Because jet boats have either no or minimal lower steering appendages, they tend to be more difficult to maneuver; consequently, jet boats are involved in collision type accidents. So, in this case, by eliminating one accident mode-

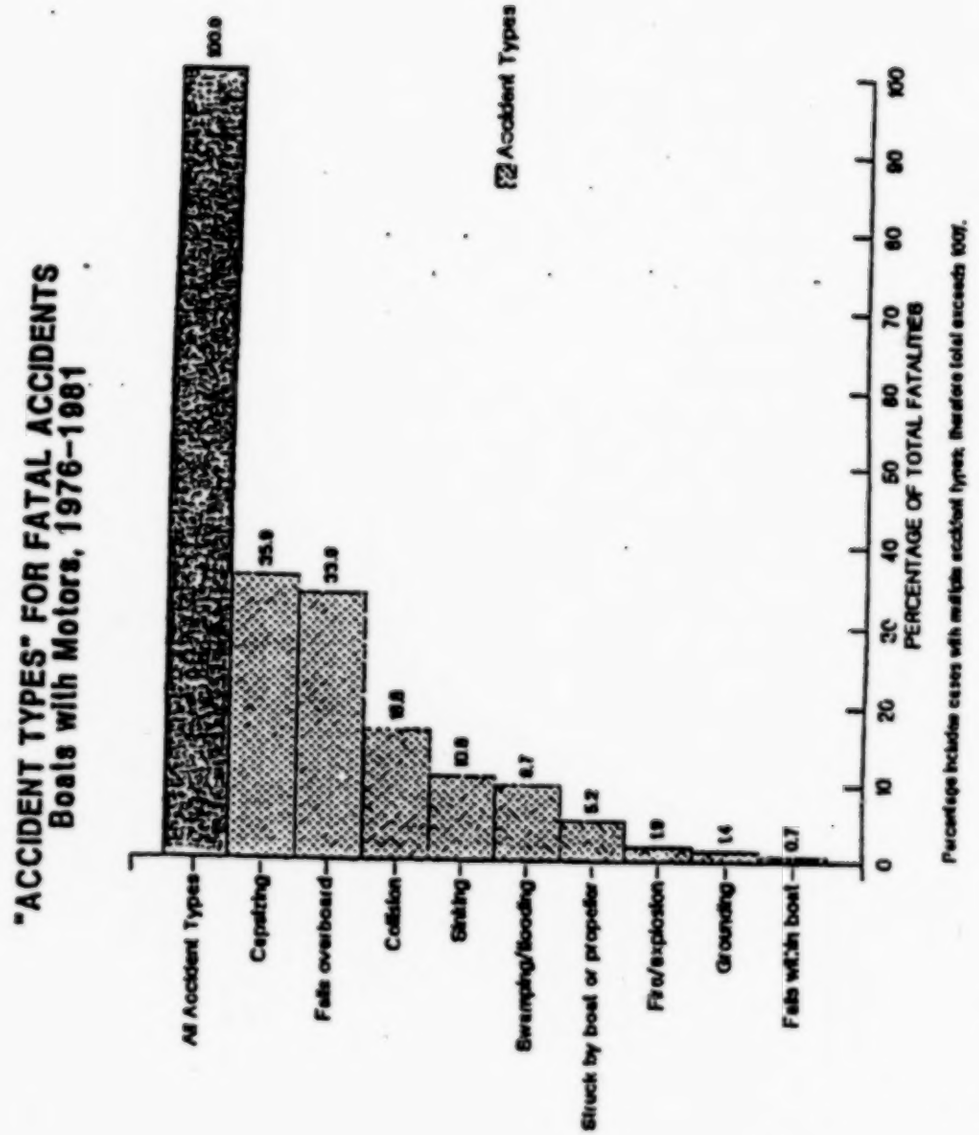
propeller strikes – other accident modes have been created or increased – collisions.

Chart 6 Risk of Injury by Activity

This chart shows the comparative injury risk (non-fatal incidents) for various activities. Its derivation is similar to the Risk of Fatality chart. Hospitalized injuries related to propellers while boating or water-skiing are approximately one-half of one percent of the risk of injury while boating or water-skiing.

I would be pleased to elaborate on any of the above issues. If the committee has specific questions they desire to be addressed or if you need further explanation of the background or references for the summary charts, please call.

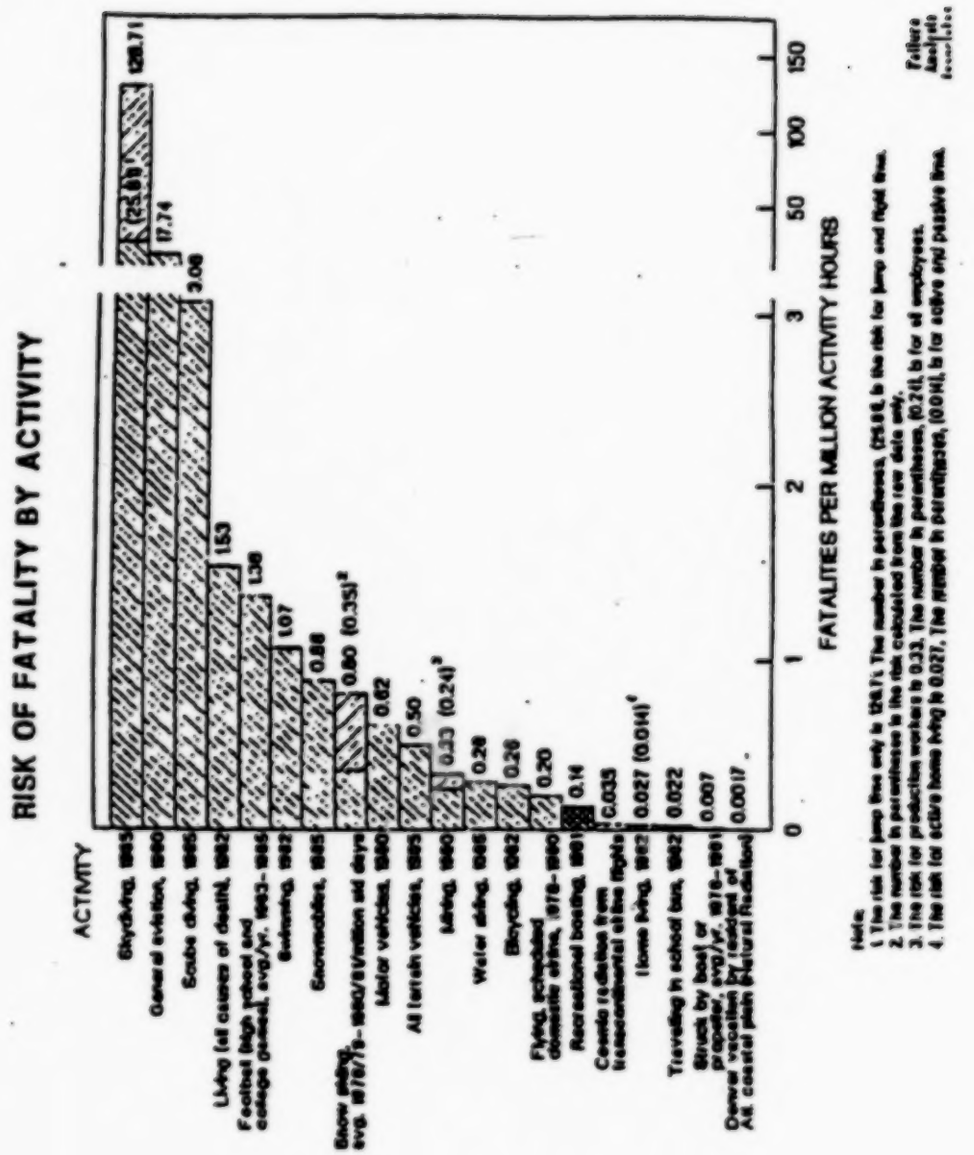
Sincerely,
/s/
Robert K. Taylor, P.E.
Managing Engineer
Naval Architecture & Marine Engineering
RKT:dg\getz.doc
Enclosure
Charts (1 orig & 6 Color Copies)



ANNUAL FATALITIES

All Causes, 1980	1,989,841
All Accidents, 1980	105,718
Motor Vehicles, 1980	53,172
Suicide, 1980	26,869
Homicide, 1980	23,967
Falls, 1980	13,294
Drowning, 1981	6,404
Swimming, 1981	2,513
Fires, Burns, 1980	5,822
Ingestion of Food, Object, 1980	3,249
Construction, 1980	2,500
Recreational Boating, 1980	1,884
General Aviation, 1980	1,237
Bicycling, 1980	965
Mining, 1980	500
Flying Scheduled Domestic Airline, annual avg. for 1978-1980	98
Lightning, 1980	94
Scuba Diving, 1980	89
Skydiving (Jump and Flight), 1980 (Jump Only)	47 (45)
Skiing, annual avg. for 1978/79-1980/81 (Raw Data)	37 (16)

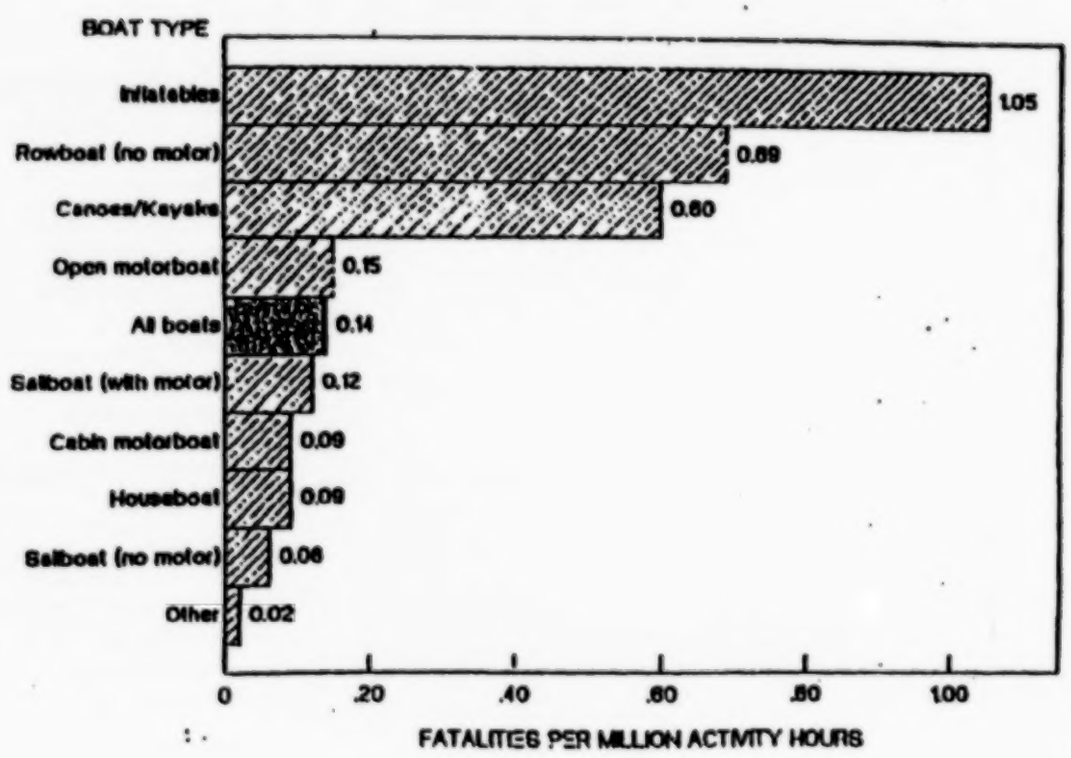
Note: Fatalities for recreational boating from U.S. Coast Guard Boating Accident Reporting System (BARS), and includes water skiing fatalities.



Notes:
1. The risk for jump time only is 128.71. The number in parentheses, (25.61), is the risk for jump and flight time.
2. The number in parentheses is the risk calculated from the raw data only.
3. The risk for production workers is 0.33. The number in parentheses, (0.24), is for all employees.
4. The risk for active home living is 0.027. The number in parentheses, (0.014), is for active and passive time.

Failure Analysis Associates

RISK OF BOATING FATALITY IN 1981

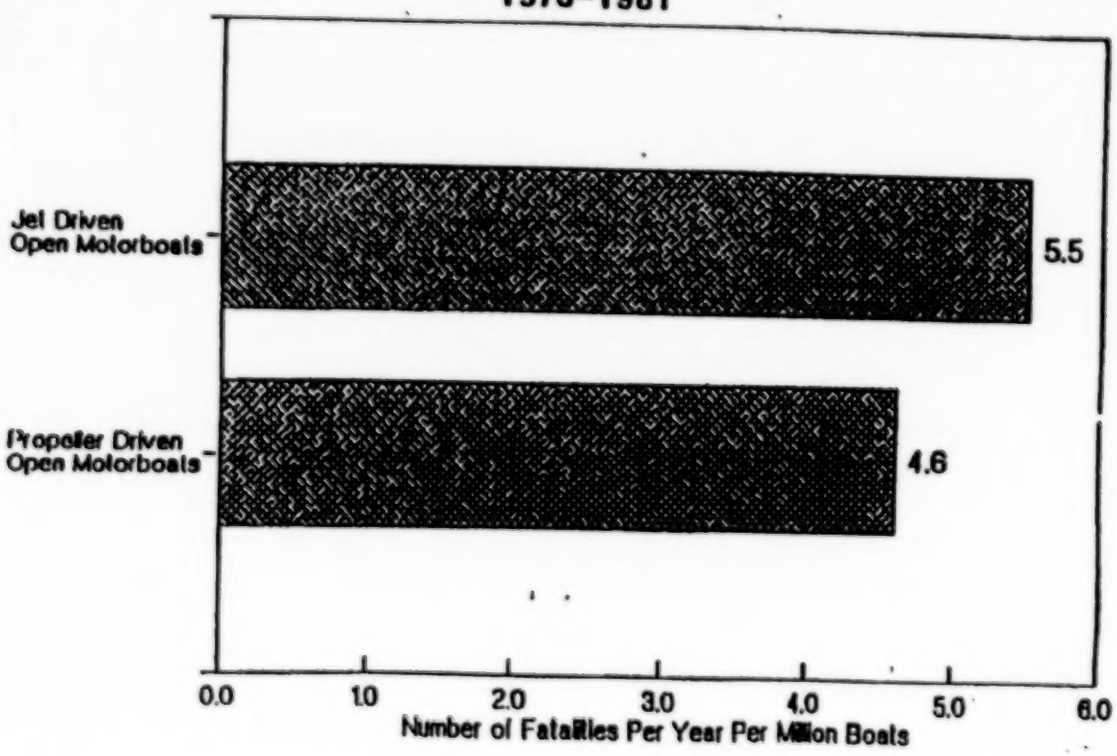


Note: Data from United States Coast Guard.

Failure Analysis Associates

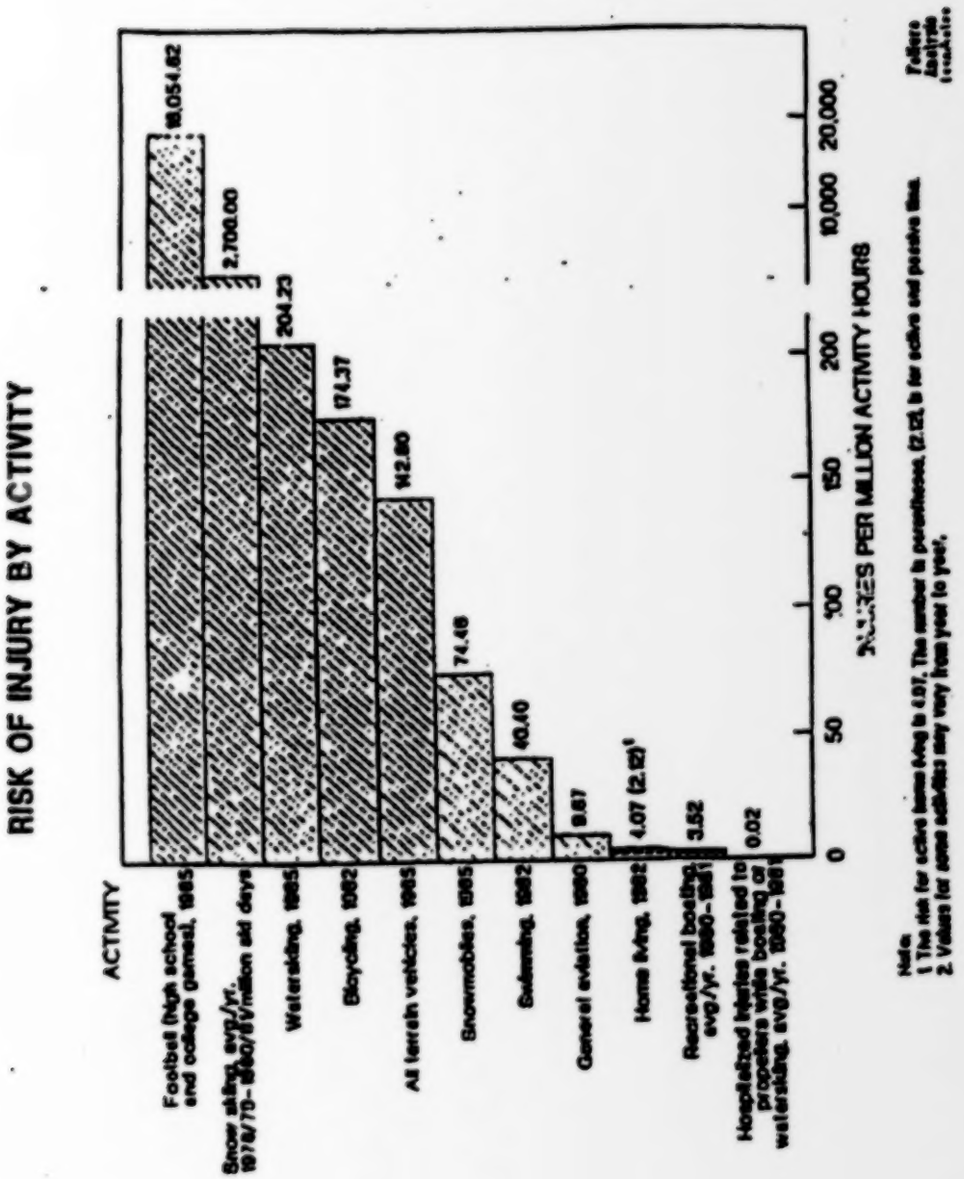
App. 68

RATE OF BOATING FATALITIES IN WHICH THE ACCIDENT WAS DESCRIBED AS "STRUCK BY BOAT OR PROP" 1975–1981



Failure Analysis Associates

App. 69



APPENDIX F

Subcommittee Members

The following members participated in the Subcommittee's deliberations and consideration of conclusions and recommendations:

CAPT. James E. Getz, Chairman, State Member
Mr. Donald J. Kerlin, U.S.C.G. Representative
Mr. Richard H. Lincoln, Industry Member
Mr. William D. Selden, Public Member
Mr. Herman T. VanMell, Public Member

The following members served at various lengths on the Subcommittee, but were not on the Subcommittee at the time of the consideration of conclusions and recommendations:

Mr. William M. Fast, Public Member
Mr. Roy T. Montgomery, Industry Member
LT. Joe L. Ruelas, State Member

Minutes of the 44th Meeting of the
National Boating Safety Advisory Council
(November 6-7, 1989)

44th MEETING
OF THE
NATIONAL BOATING SAFETY ADVISORY COUNCIL
LAS PALMAS
INTERNATIONAL DRIVE
ORLANDO, FLORIDA
6 - 7 NOVEMBER 1989

Monday 6 November 1989

0800 – Meeting called to order by Chairman Garden.

A complete record of all council proceedings is available on audio tape. For further information contact:

Captain W.S. Griswold, USCG
Executive Director
National Boating Safety Advisory Council
U.S. Coast Guard (G-NAB)
Washington, D.C. 20593-0001

Telephone (202) 267-1077 or Mr. Dean Klinger, Executive Secretary, NBSAC, at (202) 267-0997.

Council Members Present

Mr. A. Newell Garden, Chairman
Mr. John E. Bishop, Sr.
Mr. M.S. Blackistone
Mr. Robert E. Brightbill
Mr. Paul E. Donheffner
COL Donald N. Ellingsen
Ms. Yvonne S. Ferrell
Mr. E. Charles Game
CAPT James E. Getz
Mr. Philip Haseltine
Mr. Richard H. Lincoln
Mr. Robert F. MacNeill
Mr. Roy T. Montgomery
COL David E. Scott
Mr. William D. Selden
Mr. Al Simon
Mrs. Charlotte Toups
Mr. Eric A. Tulla
Mr. Herman T. Van Mell
The Honorable Chandler L. van Ornan
LT Michael Vinton

Council Members Absent

NONE

U.S. Coast Guard Headquarters' Representatives Present

CAPT W.S. Griswold, Executive Director, National Boating Safety Advisory Council (NBSAC) and Chief, Auxiliary, Boating, and Consumer Affairs Division, Office of Navigation Safety & Waterway Services; Mr. Dean E. Klinger, Executive Secretary, NBSAC; Mr. Donald Kerlin, Chief, Product Safety Assurance Branch; Mr. Richard Bergen, Chief, Consumer and Regulatory Affairs Branch; LT Randell Sharpe, Merchant Vessel Inspection and Documentation Division, Office of Marine Safety, Security and Environmental Protection; Commander Tom Meyers, Executive Director, Rules of the

Road Advisory Council, Office of Navigation Safety & Waterway Services.

[Text Omitted]

TUESDAY 7 NOVEMBER 1989

0800 Chairman Garden called the meeting to order:

MEMBERS PRESENT

Same as preceeding [sic] day (except Ms. Ferrell)

MEMBER ABSENT

Ms. Ferrell

VIDEO – "Boating Safety" courtesy of WCVB-TV/BOSTON

REPORT OF THE COMMITTEE ON PROPELLER GUARDS

Captain James Getz, Subcommittee Chairman, explained that his committee was charged to review, among other things, available information and obtain as much information as possible on the issue of strike by boat or propeller and subsequent or possible guarding or other related issues. He said that they provided the first objective opportunity for public review of what everyone knows is a very emotional and highly controversial subject. He stressed that the subcommittee was given only a charge and no specific recommendations or suggested conclusions by either of the Council Chairman or the Coast Guard. He remarked that the final report received

unanimous approval by the subcommittee members and there were no dissenting opinions or views. Captain Getz orally presented the following conclusions of the subcommittee to the Council.

1. Accident data and the analysis of accident data must be an integral component of a study of this nature. There is no one single source, best source, or all-inclusive source of accident data. However, the available sources can be utilized collectively to give an accurate portrayal of the significance, frequency, and relative magnitude of underwater impacts to other causes of boating accidents in particular and accidents in general. There is no indication that any change in reporting would reflect significant changes in the relative position or percentage of injuries/fatalities due to underwater impacts. Therefore, propeller guarding at best could have only a negligible impact on improving boating safety.

2. Injuries/fatalities, caused by underwater impacts, result from a person coming into contact with the propeller or any part of the propulsion unit (i.e., lower unit, skeg, torpedo, anti-ventilation plate, etc.) and even the boat itself. Currently reported accidents make it obvious that all such components are involved in the total picture, and that the propeller itself is the sole factor in only a minority of impacts. The development and use of devices such as "propeller guards" can, therefore, be counter-productive and can create new hazards of equal or greater consequence.

3. Operator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities. Mandatory equipment requirements could be

expected to have only a negligible impact on this problem. The most rational approach to the problem is to educate boaters, especially operators. They must be made to understand the abilities and limitations of their equipment. They must be aware of and understand the hazards their boat can cause to people in the water. Above all, they must be made to understand the consequences of careless or negligent operation of their watercraft, and how they, as boat operators, can act to prevent accidents.

4. Although the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

Captain Getz informed the council that his subcommittee's recommendations are:

1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

4. The U.S. Coast Guard should work with appropriate voluntary standards-making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft vision of the boat operator.

6. The U.S. Coast Guard should encourage a system for review of current enforcement programs aimed at reducing boat accidents and should provide possible support to implement, maintain, and expand those programs targeting the prevention of accidents.

Captain Getz publicly thanked subcommittee members Richard H. Lincoln, William D. Selden and Herman T. Van Mell and Coast Guard representative Donald J. Kerlin for their extremely significant contributions to the project.

MOTION: that the Council accept the report, adopt the recommendations of the subcommittee, and discharge the subcommittee as having completed its task.

VOTE: In Favor – Unanimous

Mr. Lincoln commended Captain Getz for his performance as chairman of the subcommittee.

Chairman Garden told the Council that he had attended most of the subcommittee's meetings and had a very favorable impression of Captain Getz's leadership abilities.

Ms. Linda Barnby, a propeller strike accident victim, informed the Council that many more propeller strike accidents have occurred than have been reported to boating authorities. She feels that it is obvious that all related information is not in yet and that the search for new technology must continue in order to protect people and marine life.

A complete copy of the subcommittee's report may be obtained by contacting the Executive Secretary at the address or phone number listed on the first page.

Copies of all documents reviewed by the subcommittee may be obtained by contacting the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

Ms. Judith Valles, Save the Manatee representative, informed the Council on the problem of injury or death of manatees as a result of contact with boats and/or motors in Florida waters.

She concurred with Ms. Barnby's recommendation for continued research on propeller guards.

Chairman Garden assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened.

[Text Omitted]

February 1, 1990

Department of Transportation
United States Coast Guard

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance

Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of college students to gather hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be

developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our National Nonprofit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position: Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

s/

ROBERT T. NELSON
Rear Admiral, U. S. Coast Guard
Chief, Office of Navigation Safety
and Waterway Services

60 *Federal Register* 25191
(May 11, 1995)

3 CFR Part 183
[CGD 95-041]
Propeller Accidents Involving Houseboats and Other Displacement Type Recreational Vessels

AGENCY: Coast Guard, DOT.

ACTION: Notice; request for comments.

SUMMARY: Boating accidents involving propeller strikes often generate a great deal of interest and concern. As a result of a serious accident involving a rented houseboat which occurred in 1993, for example, the Coast Guard has received considerable correspondence seeking the initiation of a rulemaking project to establish mandatory requirements for propeller guards on recreational houseboats and other displacement-type (non-planing) vessels, including those leased by livery operations. The Coast Guard wants to get an understanding of the public's present feelings about the use of propeller guards or possible alternatives to propeller guards on these vessels. In order to identify and consider the potential impacts such a requirement may have on the boating public, boat owners, boat operators, manufacturers, and livery companies leasing such vessels, the Coast Guard is requesting comments from interested parties.

DATES: Comments are requested by July 10, 1995.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD 95-041), U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, D.C. 20593-0001, or may be delivered to room 3406 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal Holidays. The telephone number is (202) 267-1477.

The Executive Secretary maintains the public docket for this notice. Comments will become part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Mr. Alston Coliban, Project Manager, Auxiliary, Boating, and Consumer Affairs Division, (202) 267-0981.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this request for comments by submitting written data, views or arguments. Persons submitting comments should include their names and addresses and identify this notice (CGD 95-041). Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

Background and Purpose

The Federal statutes in 46 U.S.C. 4302 which authorize the Coast Guard to develop boating safety standards specify that such standards must be based upon a demonstrated need. In establishing a need, the Coast Guard must:

1. Consider the extent to which the regulations or standards will contribute to boating safety;

2. Consider relevant available boating safety standards, statistics and data, including public and private research and development, testing and evaluation;

3. Not compel substantial alteration of a recreational vessel or equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

4. Consult with the National Boating Safety Advisory Council.

Current regulations in 33 CFR 173 and 174 require the operator of any vessel numbered or used for recreational purposes to file a Boating Accident Report (BAR) if the vessel is involved in an accident that results in: (1) Loss of life; (2) personal injury which requires medical treatment beyond first aid; (3) damage to the vessel and other property exceeding $500; or (4) complete loss of the vessel. Boat operators are

required to report their accidents to authorities in the State where the accident occurred, or directly to the Coast Guard if the accident occurred in Alaska. However, ongoing research indicates only a small percentage of reportable non-fatal boating accidents are reported each year.

Currently available data does not support a need for Federal regulations to require propeller guards on houseboats. Over 31,000 boating accidents were reported to the Coast Guard for the years 1989 to 1993. The BAR data base indicates that 17 "Struck By Boat or Propeller" accidents involving houseboats were reported, with 16 injuries and one fatality. Three accidents resulting in three injuries were of the category, "Struck by Boat," and 14 were of the category, "Struck by Propeller," and resulted in 13 injuries and one fatality.

Solicitation of Views

The Coast Guard solicits comments from all segments of the marine community and other interested persons on various aspects of propeller accident avoidance, including: (1) The economic and other impacts of establishing a requirement for propeller guards on recreational houseboats and other displacement vessels; (2) suggestions on alternatives to propeller guards which should also be considered; (3) recommendations on the applicability of regulations; and (4) the concerns of the recreational vessel livery and charter industries.

Persons submitting comments should do so as directed under *Request for Comments* above, and specify the area(s) of concern on which comments are being submitted, state what impacts may result from one or more alternatives identified,

suggest other alternatives, and provide reasons to support the information provided on potential impact or suggested alternatives.

The Coast Guard will consider all relevant comments in determining what action may be necessary to address propeller accidents involving houseboats and other displacement-type recreational vessels.

Dated: May 3, 1995.

G.A. Penington,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 95-11661 Filed 5-10-95; 8:45 am]
BILLING CODE 4910-14-M

61 *Federal Register* 13123
(March 26, 1996)

33 CFR Part 183
[CGD 95-041]
Propeller Injury Prevention Aboard Rental Boats

AGENCY: Coast Guard, DOT.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The purpose of this Advance Notice of Proposed Rulemaking (ANPRM) is to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats. In a request for comments published May 11, 1995, the Coast Guard solicited comments from all segments of the marine community and other interested persons on various aspects of propeller accident avoidance aboard houseboats and other displacement type recreational vessels. The information received was voluminous, but was too general to be helpful. Consistent with the President's Regulatory Reinvention Initiative, the Coast Guard is interested in obtaining maximum public involvement before it makes any decision that would impose a new burden on the regulated community. Information gathered in response to this ANPRM will supplement that which the Coast Guard received in response to the request for comments and will be used to determine the appropriate Federal and State roles in reducing propeller-strike incidents, whether governmental intervention is appropriate and, if so, whether it should be directed at the vessels, their manufacturers, their operators or owners, or the companies leasing such vessels. This ANPRM also announces

one public meeting at Coast Guard Headquarters at which individuals and interested parties may make oral presentations about the propeller strike avoidance issue. The Coast Guard has also arranged four other opportunities, throughout the country, for those interested in this subject to express their views.

DATES: Comments must be received on or before September 1, 1996.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD95-041), U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, D.C. 20593-0001, or may be delivered to room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal Holidays. The telephone number is (202) 267-1477.

The Executive Secretary maintains the public docket for this notice. Comments will become a part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT: Mr. Randolph Doubt, Project Manager, Recreational Boating Product Assurance Division, (202) 267-0984.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to submit written data, views or arguments. Persons submitting

comments should include their names and addresses and identify this notice (CGD 95-041). Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose a stamped, self-addressed postcard or envelope.

The Coast Guard will consider all comments received during the comment period.

Background Information

The Coast Guard published a request for comments on propeller accidents involving houseboats and other displacement type recreational vessels on May 11, 1995 (60 FR 25191). In a second **Federal Register** notice published August 9, 1995, the Coast Guard reopened and extended the comment period until November 7, 1995. The Coast Guard received 1,994 responses. More than 1,800 of these were form letters from individuals who support the development of regulations to require the use of propeller guard technology or pump jet propulsion on vessels used in the rental houseboat industry. An additional 69 comments supporting the development of regulations to prevent the incidence of propeller-strike accidents were received from accident victims and their relatives, attorneys, physicians, State law enforcement agencies, manufacturers of devices designed to prevent propeller-strike accidents, and other individuals. Comments opposing regulations were received from 57 boaters, nine houseboat livery operators and marinas, members of 10 associations, committees, or councils, 13 boat and engine manufacturers, and six naval architects or marine consultants.

Solicitation of Views

While available data in the Coast Guard's regulatory docket on this subject does not fully support the costs or burdens that would be imposed by Federal regulation, the number of responses received to the request for comments indicates a great deal of public interest in whether and how the Federal Government should act to prevent propeller-strike accidents.

Persons submitting comments should do so as directed under **Request for Comments** above, and reply to the following specific questions. Form letters simply citing anecdotal evidence or stating support for, or opposition to regulations, without providing substantive data or arguments do not supply support for regulations.

1. The Coast Guard is making an effort to improve its database of recreational boating accidents resulting in injuries which require medical treatment beyond first aid. Part of that effort consists in trying to determine the extent to which accidents involving propeller strikes by rented boats are a problem. What information is available regarding the incidence of propeller-strike injuries or fatalities involving individuals who rent boats, and what trends, if any, do the data indicate?

2. To what extent are data available to indicate whether the type of propulsion (e.g., outboard motor, inboard engine or inboard-outboard engine) contributes to the incidence of propeller-strike accidents involving rental boats?

3. In two fatal accidents during the last several years, one on Lake Shasta and one on Lake Havasu, the victim was in the water and was struck by the propeller when a rental houseboat was put in reverse and backed into them. Several other houseboat accidents have resulted in injuries. The Coast Guard is interested in determining whether accidents involving propeller strikes and rented houseboats occur nationwide, or are limited to a few States or bodies of water. If the latter is the case, do any particular hazardous local conditions contribute to the likelihood of such accidents? If so, the Coast Guard is interested in determining the nature and location of those conditions.

4. To what extent are data available on the relationship between the consumption of alcohol or the use of controlled substances and propeller-strike accidents involving rental boats?

5. Some States have laws requiring boat operators to complete a boating safety course.

a. To what extent do available data indicate whether boater behavior patterns, a lack of boating education, or a lack of boating law enforcement contribute to the incidence of propeller-strike accidents involving rental boats?

b. Do data indicate whether mandatory boating education for individuals renting boats with propellers significantly contribute to a reduction in the number of propeller-strike accidents?

c. If so, do data indicate what type of boating education would be the most effective?

d. What other vessel operator-oriented requirements might reduce the incidence of propeller-strike accidents involving rental boats?

e. What economic or other burdens would be imposed on companies leasing recreational boats if either the Federal or State Government was to require education of individuals renting propeller-driven boats?

6. The two fatal accidents mentioned above occurred when individuals were in the water astern of the vessels and the vessels were put in reverse. While limited operator visibility astern may have contributed to the accidents, the transom is also the usual location for swim platforms and boarding ladders for swimmers. Do available data indicate whether vessel design features contribute to the incidence of propeller-strike accidents involving rental boats? If so, what vessel design features might reduce the incidence of propeller-strike accidents involving rental boats?

7. Are there any proven technologies that would help reduce the risk of propeller-strike accidents involving rented boats? What technologies are unacceptable, and for what reasons?

8. The two fatal accidents mentioned above involved rental houseboats. If the Coast Guard developed regulations in

this area, how should it define the term, "houseboat?" Are there any other vessel types the Coast Guard should consider regulating? If so, what vessels, if any, should be excepted from such regulations?

9. What, if any, types of information should be displayed on boats and/or motors leased, rented or chartered for noncommercial use for the purpose of alerting operators or passengers to the dangers of a propeller strike?

10. What are the economic and other impacts on companies renting boats or other entities if the Coast Guard were to require companies to retrofit such vessels with devices or methods of propulsion designed to reduce the incidence of propeller-strike accidents? In considering regulations, the Coast Guard must assess the potential adverse impacts on small business entities. To what extent are small entities engaged in leasing recreational boats?

11.a. How many companies are currently leasing propeller-driven boats for bareboat charters by the recreational boating public? How many vessels are involved and on which bodies of water?

b. How many companies are currently offering propeller-driven uninspected boats for charter by the recreational boating public? How many vessels are involved and on which bodies of water?

12. What adverse impacts might result from the regulation requiring livery companies to verbally brief individuals renting propeller-driven boats about the dangers of

propeller-strike accidents, and requiring individuals chartering such vessels to acknowledge receiving the information?

13. Under current Federal statutes (46 U.S.C. 4306), the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction. However, a State may impose more stringent requirements on vessels such as rental boats on waters subject to the State's exclusive jurisdiction, so long as such a requirement is not imposed upon vessel manufacturers. What is the proper role for the States in reducing propeller-strike accidents involving rented boats? If the Coast Guard allowed the States to regulate the equipment carried, or the use of rental boats, how would interstate commerce be affected?

Open Meetings

A subcommittee of the National Boating Safety Advisory Council, and the National Association of State Boating Law Administrators are studying the propeller injury prevention issue. The Coast Guard invites interested parties and the public to make brief oral presentations about the propeller injury prevention issue during the following meetings or events:

From 5 to 7 p.m., Monday, April 22, 1996 at the National Water Safety Congress Professional Development Seminar at the Boardwalk Resort in Panama City, FL, (April 23-25, 1996).

From 3 to 5 p.m., Monday April 29, 1996 at the National Boating Safety Advisory Council Meeting at the Parc Fifty-Five Hotel in San Francisco, CA (April 27-29, 1996).

From 8:30 to 10:30 a.m., Wednesday May 1, 1996 at the Northeastern States Boating Law Administrators Conference in the Camden Room at the Samoset Resort in Rockland, ME (April 29-30, 1996).

From 1 to 4 p.m., Monday, May 6, 1996 in Room 2415 of Coast Guard Headquarters in Washington, D.C.

From 10 a.m. to 12 p.m., Sunday, May 19, 1996 at the Southern States Boating Law Administrator Conference at the Royal Sonesta Hotel in New Orleans, LA (May 18-22, 1996).

Those wishing to give an oral presentation should submit their name, address, and organization represented (if any) at least seven days prior to the particular meeting or event, to COMMANDANT (G-NAB-6), room 1505, U.S. Coat [sic] Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, Attn: Mr. Jay Doubt. Individuals wishing to give an oral presentation who fail to notify the Coast Guard within seven days of a particular meeting or event will be allowed to do so if time permits.

Those giving oral presentations are reminded of the necessity to also furnish written comments, if those comments are intended for inclusion in the regulatory docket.

The Coast Guard will consider all relevant comments in determining what action may be necessary to address propeller accidents involving rented propeller-driven vessels.

Dated: March 15, 1996.

Rudy K. Peschel,
Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.
[FR Doc. 96-7304 Filed 3-25-96; 8:45 am]
BILLING CODE 4910-14-M

Firm No. 31444

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, Deceased,	)	
Plaintiff,	)	
v.	)	No.
MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation; and EBBTIDE CORPORATION, a corporation,	)	
Defendants.	)	

COMPLAINT AT LAW
Count I
Strict Liability-Wrongful Death-Brunswick

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation (hereinafter "BRUNSWICK"), states:

1. On and before July 10, 1995, Defendant, BRUNSWICK, an entity doing business in Cook County, Illinois, was in the business of designing, manufacturing, distributing and selling outboard motors for boats.

2. Prior to July 10, 1995, Defendant, BRUNSWICK, did design, manufacture, distribute and sell what is commonly known as a Mercury motor being used on an Ebbtide motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. At the aforesaid time and place and at the time the motor left the hands of Defendant, BRUNSWICK, it was in an

unreasonably dangerous condition in one or more of the following respects:

a. Failed to provide a device to protect plaintiff's decedent from contact with the whirling propeller blades;

b. Failed to supply what is known as a propeller guard with the aforesaid motor;

c. Provided an unreasonably dangerous design in utilizing an unprotected propeller;

d. Failed to utilize alternative feasible designs including, but not limited to, alternative propulsion systems;

e. Exaggerated performance differences between motors with and without propeller guards in an effort to keep such guards from becoming required.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries which resulted in her death on July 10, 1995.

9. Plaintiff, REX R. SPRIETSMA, is the decedent's appointed Administrator and husband of JEANNE SPRIETSMA, and has suffered substantial pecuniary loss as a result of her death.

10. Plaintiff's decedent, JEANNE SPRIETSMA, also left surviving her son, ROSS SPRIETSMA, a minor, who has also suffered substantial pecuniary loss as a result of her death.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count II
Negligence-Wrongful Death-Brunswick

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation (hereinafter "BRUNSWICK"), states:

1. On and before July 10, 1995, Defendant, BRUNSWICK, an entity doing business in Cook County, Illinois, was in the business of designing, manufacturing, distributing and selling outboard motors for boats.

2. Prior to July 10, 1995, Defendant, BRUNSWICK, did design, manufacture, distribute and sell what is commonly known as a Mercury motor being used on an Ebbtide motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. At the aforesaid time and place and at the time the motor left the hands of Defendant, BRUNSWICK, Defendant was negligent in one or more of the following respects:

a. Failed to provide a device to protect plaintiff's decedent from contact with the whirling propeller blades;

b. Failed to supply what is known as a propeller guard with the aforesaid motor;

c. Provided an unreasonably dangerous design in utilizing an unprotected propeller;

d. Failed to utilize alternative feasible designs including, but not limited to, alternative propulsion systems;

e. Exaggerated performance differences between motors with and without propeller guards in an effort to keep such guards from becoming required.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries which resulted in her death on July 10, 1995.

9. Plaintiff, REX R. SPRIETSMA, is the decedent's appointed Administrator and husband of JEANNE SPRIETSMA, and has suffered substantial pecuniary loss as a result of her death.

10. Plaintiff's decedent, JEANNE SPRIETSMA, also left surviving her son, ROSS SPRIETSMA, a minor, who has also suffered substantial pecuniary loss as a result of her death.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count III
Strict Liability-Survival-Brunswick

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation (hereinafter "BRUNSWICK"), states:

1. On and before July 10, 1995, Defendant, BRUNSWICK, an entity doing business in Cook County, Illinois, was in the business of designing, manufacturing, distributing and selling outboard motors for boats.

2. Prior to July 10, 1995, Defendant, BRUNSWICK, did design, manufacture, distribute and sell what is commonly known as a Mercury motor being used on an Ebbtide motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. At the aforesaid time and place and at the time the motor left the hands of Defendant, BRUNSWICK, it was in an unreasonably dangerous condition in one or more of the following respects:

a. Failed to provide a device to protect plaintiff's decedent from contact with the whirling propeller blades;

b. Failed to supply what is known as a propeller guard with the aforesaid motor;

c. Provided an unreasonably dangerous design in utilizing an unprotected propeller;

d. Failed to utilize alternative feasible designs including, but not limited to, alternative propulsion systems;

e. Exaggerated performance differences between motors with and without propeller guards in an effort to keep such guards from becoming required.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries including severe pain and suffering and emotional distress which eventually resulted in her death on July 10, 1995, and had she survived, she would have been entitled to bring an action for damages, and such action has survived her.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count IV
Negligence-Survival-Brunswick

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation (hereinafter "BRUNSWICK"), states:

1. On and before July 10, 1995, Defendant, BRUNSWICK, an entity doing business in Cook County, Illinois, was in the business of designing, manufacturing, distributing and selling outboard motors for boats.

2. Prior to July 10, 1995, Defendant, BRUNSWICK, did design, manufacture, distribute and sell what is commonly known as a Mercury motor being used on an Ebbtide motor

boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. At the aforesaid time and place and at the time the motor left the hands of Defendant, BRUNSWICK, Defendant was negligent in one or more of the following respects:

a. Failed to provide a device to protect plaintiff's decedent from contact with the whirling propeller blades;

b. Failed to supply what is known as a propeller guard with the aforesaid motor;

c. Provided an unreasonably dangerous design in utilizing an unprotected propeller;

d. Failed to utilize alternative feasible designs including, but not limited to, alternative propulsion systems;

e. Exaggerated performance differences between motors with and without propeller guards in an effort to keep such guards from becoming required.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries including severe pain and suffering and emotional distress which eventually resulted in her death on July 10, 1995, and had she survived, she would have been entitled to bring an action for damages, and such action has survived her.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count V
Strict Liability-Wrongful Death-Ebbtide

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, EBBTIDE CORPORATION, a corporation, states:

1. On and before July 10, 1995, Defendant, EBBTIDE, was in the business of designing, manufacturing, distributing and selling outboard motor boats.

2. Prior to July 10, 1997, Defendant, EBBTIDE, did design, manufacture, distribute and sell what is commonly known as a EBBTIDE motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. Prior to July 10, 1995 and at the time the aforesaid boat left the hands of Defendant, EBBTIDE, it was in an unreasonably dangerous condition in one or more of the following respects:

a. Allowed for open bow seating to the very front edge of the bow;

b. Failed to provide sufficient back support in the seating area provided;

c. Failed to provide any substantial form of rail or guard to obstruct a fall out of the boat from the provided seating; and

d. Failed to warn regarding the marginal back support on the seating at the bow front.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries which resulted in her death on July 10, 1995.

9. Plaintiff, REX R. SPRIETSMA, is the decedent's appointed Administrator and husband of JEANNE SPRIETSMA, and has suffered substantial pecuniary loss as a result of her death.

10. Plaintiff's decedent, JEANNE SPRIETSMA, also left surviving her son, ROSS SPRIETSMA, a minor, who has also suffered substantial pecuniary loss as a result of her death.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **EBBTIDE CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count VI
Negligence-Wrongful Death-Ebbtide

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, EBBTIDE CORPORATION, a corporation, states:

1. On and before July 10, 1995, Defendant, EBBTIDE, was in the business of designing, manufacturing, distributing and selling outboard motor boats.

2. Prior to July 10, 1995, Defendant, EBBTIDE, did design, manufacture, distribute and sell what is commonly known as an EBBTIDE motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and

was impacted by the propeller blades of the aforesaid boat motor.

7. Prior to July 10, 1995 and at the time the aforesaid boat left the hands of Defendant, EBBTIDE, Defendant was negligent in one or more of the following respects:

a. Allowed for open bow seating to the very front edge of the bow;

b. Failed to provide sufficient back support in the seating area provided;

c. Failed to provide any substantial form of rail or guard to obstruct a fall out of the boat from the provided seating; and

d. Failed to warn regarding the marginal back support on the seating at the bow front.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries which resulted in her death on July 10, 1995.

9. Plaintiff, REX R. SPRIETSMA, is the decedent's appointed Administrator and husband of JEANNE SPRIETSMA, and has suffered substantial pecuniary loss as a result of her death.

10. Plaintiff's decedent, JEANNE SPRIETSMA, also left surviving her son, ROSS SPRIETSMA, a minor, who has also suffered substantial pecuniary loss as a result of her death.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **EBBTIDE CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count VII
Strict Liability-Survival-Ebbtide

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, EBBTIDE CORPORATION, a corporation, states:

1. On and before July 10, 1995, Defendant, EBBTIDE was in the business of designing, manufacturing, distributing and selling outboard motor boats.

2. Prior to July 10, 1995, Defendant, EBBTIDE, did design, manufacture, distribute and sell what is commonly known as an EBBTIDE motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. Prior to July 10, 1995 and at the time the aforesaid boat left the hands of Defendant, EBBTIDE, it was in an unreasonably dangerous condition in one or more of the following respects:

a. Allowed for open bow seating to the very front edge of the bow;

b. Failed to provide sufficient back support in the seating area provided;

c. Failed to provide any substantial form of rail or guard to obstruct a fall out of the boat from the provided seating; and

d. Failed to warn regarding the marginal back support on the seating at the bow front.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries including severe pain and suffering and emotional distress which eventually resulted in her death on July 10, 1995, and

had she survived, she would have been entitled to bring an action for damages, and such action has survived her.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **EBBTIDE CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count VIII
Negligence-Survival-Ebbtide

Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased, by his attorneys, POWER ROGERS & SMITH, P.C., complaining of defendant, EBBTIDE CORPORATION, a corporation, states:

1. On and before July 10, 1995, Defendant, EBBTIDE, was in the business of designing, manufacturing, distributing and selling outboard motors for boats.

2. Prior to July 10, 1993, Defendant, EBBTIDE, did design, manufacture, distribute and sell what is commonly known as an EBBTIDE motor boat to Brian R. Geiling and Louise Geiling of Cook County, Illinois.

3. Prior to July 10, 1995, Brian and Louise Geiling traveled with the boat and motor in tow from Cook County, Illinois to Tennessee for a brief vacation.

4. Prior to July 10, 1995, Plaintiff's Decedent, JEANNE SPRIETSMA, traveled with her husband, REX SPRIETSMA, and her son, ROSS SPRIETSMA from their Illinois home to join the Geilings on vacation.

5. On July 10, 1995, Plaintiff's decedent, JEANNE SPRIETSMA, was a passenger in the aforesaid boat near Dale Hollow Lake/Mitchell Creek, Livingston, Tennessee.

6. At the aforesaid time and place, plaintiff's decedent, JEANNE SPRIETSMA, was caused to fall from the boat and was impacted by the propeller blades of the aforesaid boat motor.

7. Prior to July 10, 1995 and at the time the aforesaid boat left the hands of Defendant, EBBTIDE, Defendant was negligent in one or more of the following respects:

a. Allowed for open bow seating to the very front edge of the bow;

b. Failed to provide sufficient back support in the seating area provided;

c. Failed to provide any substantial form of rail or guard to obstruct a fall out of the boat from the provided seating; and

d. Failed to warn regarding the marginal back support on the seating at the bow front.

8. As a proximate result of one or more of the aforesaid, Plaintiff's Decedent, JEANNE SPRIETSMA, suffered injuries including severe pain and suffering and emotional distress which eventually resulted in her death on July 10, 1995, and had she survived, she would have been entitled to bring an action for damages, and such action has survived her.

WHEREFORE, plaintiff, **REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, deceased**, demand judgment against defendant, **EBBTIDE CORPORATION, a corporation**, for a sum in excess of the jurisdictional limit of the Law Division of the Circuit Court of Cook County.

Count IX
Complaint for Declaratory Relief and to Otherwise Enjoin the Conduct of Various Defendants with Regard to Section 2-623 of the Illinois Code of Civil Procedure

Now comes the Plaintiff, REX SPRIETSMA as Administrator of the Estate of JEANNE SPRIETSMA, deceased, by their attorneys POWER ROGERS & SMITH, P.C., complaining of the defendants, MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation, and EBBTIDE CORPORATION, a corporation, pleading hypothetically and in the alternative, and each of them, alleges as follows:

1. The Plaintiffs repeat and reallege and incorporate by reference the preceding paragraphs of the complaint as if fully set forth herein.

2. The circumstances surrounding the Plaintiffs' and Plaintiffs' Decedents injuries give rise to a cognizable cause of action against each Defendant, and all of them, under the law of Illinois.

3. 735 ILCS 5/2-623 requires that a product liability plaintiff file an affidavit with his complaint stating that he has consulted with a qualified expert who must complete a written report after examination of the product or a review of the literature concerning the product. The report (1), in strict liability actions, must identify the specific defect that causes the unreasonable risk of harm and determine that the product was unreasonably dangerous when it left the control of the manufacturer; or (2), in all other products liability cases, must identify a "specific act of omission or other fault" on the part of the defendant and must contain a "determination that the defective condition of the product or other fault was a proximate cause of the plaintiff's harm."

4. A report is required even in a product liability case based on negligence or intentional wrongdoing, rather than strict liability in tort or implied warranty, and even if the defective nature of the product in question is well established.

5. A report is required even if the materials needed to prove that a product is defective can be obtained only by means of discovery – which is not permitted until ***after*** the plaintiff has filed his pleading. Section 2-623 does not in any way compel manufacturers to provide plaintiffs or their attorneys or expert witnesses the testing data relevant to the safety of the product.

6. Under Section 2-623, defendants are not subject to any similar requirement with respect to their pleadings, and defendants incur no comparable penalty or expense under Section 2-623. No certificate of merit requirement applies to defenses raised by defendants, no matter how unsupported they may be.

7. Plaintiffs currently suffer immediate injury due to this requirement, insofar as they must either incur the expense of complying with Section 2-623 or risk dismissal of their action.

8. The courts are left with virtually no discretion in what types of cases require affidavits.

9. Section 2-623 amounts to impermissible special legislation inasmuch as it constitutes a "special or local law when a general law . . . can be made applicable," in violation of Article IV, Section 13 of the Illinois Constitution. Section 2-623 applies only to product liability cases. The Act offers no justification for not requiring similar certificates in all cases requiring expert testimony, or for limiting its application to claims by a ***plaintiff*** rather than ***defenses*** asserted by a ***defendant***.

10. Section 2-623 invades the province of the judiciary and violate the separation of powers in Article II, Section 1 of the Illinois Constitution.

11. Section 2-623 creates an unreasonably burdensome restriction on a plaintiff's right to access to the courts and his right to a certain remedy, as guaranteed by Article I, Section 12 of the Illinois Constitution.

12. Section 2-623 transgresses the right to trial by jury, as guaranteed by Article I, Section 13 of the Illinois Constitution.

13. Section 2-623 is arbitrary and irrational, lacks a rational basis, and violates the due process guaranteed by Article I, Section 2 of the Illinois Constitution.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that this Court find as follows:

1. That the Court find 735 ILCS 5/2-623 unconstitutional.

2. That the Court find that the requirement for a certificate of merit in product liability cases is unconstitutional.

3. That the Plaintiff have such other relief as this Court shall deem necessary and proper.

POWER ROGERS & SMITH, P.C.

By /s/
Todd A. Smith

POWER ROGERS & SMITH, P.C.
Attorneys for Plaintiff
35 West Wacker Drive
Suite 3700
Chicago, IL 60601
(312) 236-9381
Atty. No. 31444

62 *Federal Register* 22991
(April 28, 1997)

DEPARTMENT OF TRANSPORTATION
Coast Guard
[CGD 95-041]
Propeller Injury Prevention Involving Rented Boats

AGENCY: Coast Guard, DOT.

ACTION: Notice; request for comments.

SUMMARY: The purpose of this notice is to solicit comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller. Comments are solicited on the extent to which such devices or interventions may reduce the severity of injuries to individuals involved in propeller-strike accidents.

DATES: Comments must be received by July 28, 1997.

ADDRESSES: You may mail comments to the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD 95-041), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001, or deliver them to room 3406 at the same address between 9:30 a.m. and 2 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-267-1477.

The Executive Secretary maintains the public docket. Comments, and documents as indicated in this preamble will become part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters, between 9:30 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Randolph Doubt, Project Manager, Recreational Boating Product Assurance Division, (202) 267-6810.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to submit written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this docket (CGD 95-041) and the specific section of this document to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

Background Information

In a request for comments published in the Federal Register on May 11, 1995, 60 FR 25191, the Coast Guard solicited comments from all segments of the marine community and other interested persons on various aspects of propeller

accident avoidance. In an Advance Notice of Proposed Rulemaking published in the **Federal Register** on March 26, 1996 [59 FR 13123], the Coast Guard solicited information to supplement what had been received in response to the original request for comments in order to determine the appropriate Federal and State roles in reducing propeller-strike incidents; whether governmental intervention is appropriate; and if so, whether it should be directed at the vessels, their manufacturers, their operators, their owners, or the companies leasing such vessels.

Based on comments received, other research efforts and after consultation with the National Boating Safety Advisory Council in November 1996, several potential devices and interventions have been suggested to aid in this endeavor. Persons submitting comments should do as directed under request for comments above, and reply to the following specific suggested devices and interventions. Form letters simply citing anecdotal evidence or stating support for or opposition to regulations, without providing substantive data or arguments do not supply support for regulations.

1. Swimming Ladders

(a) Location: Several serious propeller-strike accidents have occurred when individuals were swimming near the stern of a rented boat and someone on board the boat engaged the engine. Prohibiting the location of boarding ladders or swim platforms adjacent to or over a propeller would reduce the potential for such accidents, especially on larger boats when visibility in the water area about the boat is impaired or restricted. *(b) Interlocks:* Another

suggested device is to require the installation of an interlock to prevent engagement of the propeller(s) when a swimming ladder is in the deployed position. For swimming ladders which are always in the deployed position, a guard preventing use of the ladder would be coupled with an interlock.

2. *Large Warning Notices*

People swimming near the stern of boats with the engine(s) running may not be aware of the danger of being struck by the propeller(s) if the engine(s) are deliberately or accidentally put into gear. The operators of propeller-driven rental boats may lack sufficient boating safety education to conscientiously determine the whereabouts of passengers on board before putting the engine(s) in gear. Requiring the display of large warning notices at the helm and on the transom or engine would warn both vessel operators, passengers and swimmers of the location of the propeller(s) and danger.

3. *Clear Vision Aft*

The location of the helm on rental houseboats and other boats with a large amount of freeboard aft, severely limits the visibility of individuals who may be in the water near the transom area. On rental boats with poor visibility aft, requiring TV monitoring of the area aft of the boat would alert vessel operators to the presence of swimmers in the water near the transom area.

4. *Propeller Shaft Engagement Alarm*

Warning signals which sound when trucks and other commercial vehicles are put in reverse are useful in warning pedestrians. Requiring the installation of a similar alarm or other signal on propeller-driven rental boats when the shaft is engaged in either direction, would alert swimmers to the danger of a rotating propeller.

5. *Kill Switch/Auto Throttle and Neutral Return*

In some boating accidents involving rented houseboats, the helm was left unattended even though the engine was at idle with the propeller engaged, while passengers were either in the water or diving overboard. In other accidents, the helm was vacated due to an accidental fall or ejection overboard which allowed the boat to begin turning in a circle and to run down the former occupant(s). Requiring installation of automatic devices (no preliminary operator action necessary) to stop the engine or return the throttle to idle and the transmission to neutral, if the helm is vacated, might reduce the number of such accidents.

6. *Education*

One of the leading causes of all recreational boating accidents is operator inattention or carelessness. A lack of boating education or boating experience is a frequent cause of accidents involving rental boats. Requiring a safety and operational checkout for rental craft operators and their passengers consisting of education specifically directed to the location and dangers of propellers, might reduce the numbers of accidents in which individuals renting boats are struck by propellers.

Comments and information regarding propeller guards, pump jets (jet drives), alternatives to propeller guards, and any other devices that might reduce the likelihood of an accident or the severity of an injury are also solicited. Technical information received will be forwarded to the Marine Technology Society (MTS) which is currently conducting an availability search for off-the-shelf propeller guards, pump jets, alternatives to guards, prototypes, devices with potential for reducing accidents, and related literature. This will be followed by a period of testing and analysis, under a Coast Guard grant.

The Coast Guard will consider all relevant comments in detering [sic] what action may be necessary to address propeller accidents involving rented propeller-driven vessels.

Dated: April 17, 1997.

T.J. Meyers,
Captain, U.S. Coast Guard, Acting Director, Operations Policy.
[FR Doc. 97-10678 Filed 4-25-97; 8:45 am]
BILLING CODE 4910-14-M

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, Deceased,	)	
Plaintiffs,	)	
vs.	)	No. 96 L 7812
MERCURY MARINE, a division of BRUNSWICK CORPORATION, a corporation; and EBBTIDE CORPORATION, a corporation,	)	
Defendants,	)	

PLAINTIFF ANSWERS INTERROGATORIES PROPOUNDED BY DEFENDANT EBBTIDE CORPORATION

NOW COMES Plaintiff, REX R. SPRIETSMA, Administrator of the Estate of JEANNE SPRIETSMA, Deceased, and in answer to interrogatories pursuant to Supreme Court Rule 213, propounded by Defendant, EBBTIDE CORPORATION, Plaintiff states as follows:

1. State your full name and all other names, e.g., legal alias, maiden name, by which you have been known, date of birth, social security number, present address, marital status,

i.e., married, single, separated, widowed or divorced, and further indicate the name of your spouse and the address where your spouse, or former spouse, presently resides.

ANSWER No. 1:

Rex Sprietsma, Widow DOB: 8/16/54 SSN: 321-44-0509 8528 Brookridge Road Downers Grove, Illinois 60516	Jeanne Sprietsma, Wife (Deceased) DOB: 6/30/54 SSN: 353-48-4384

2. State the name(s) and present or last known address(es) of all persons known to plaintiff, or plaintiff's agents or attorneys, who have or claim to have knowledge of the occurrence, witnessed the occurrence or were present immediately before or after the occurrence.

17. State the time of the occurrence as accurately as you can, stating the year, month, day, hour and minute.

ANSWER No. 17:

July 10, 1995, Monday at about 3:00 p.m.

18. Describe in detail the product referred to in plaintiff's complaint, and state the product's model and serial numbers.

ANSWER TO No. 18:

1988 Ebbtide 18' ski boat, walk through, open bow (SS # 20E888), equipped with a 1988 115hp Mercury outboard motor (SN #300309).

19. Do you allege or contend that your injury, illness, or damages, was due to or caused in any way by any defect or defective condition present in the product when sold by the Defendant? If not sold by the Defendant, who, then, do you contend sold it?

ANSWER NO. 19: Yes

66 *Federal Register* 63645
(December 10, 2001)

PROPOSED RULES
DEPARTMENT OF TRANSPORTATION
Coast Guard
33 CFR Part 175

[USCG-2001-10163]
RIN 2115-AG18
Federal Requirements For Propeller Injury Avoidance Measures

Monday, December 10, 2001

AGENCY: Coast Guard, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to require owners of non-planing recreational houseboats with propeller-driven propulsion located aft of the transom to install one of two propulsion unit measures or employ three combined measures. This change responds to recommendations made by the National Boating Safety Advisory Council (NBSAC). The proposed rule would reduce the number of boaters who are seriously or fatally injured when struck by a non-planing recreational houseboat with propeller-driven propulsion.

DATES: Comments and related material must reach the Docket Management Facility on or before March 11, 2002.

ADDRESSES: To make sure that your comments and related material are not entered more than once in the docket, please submit them by only one of the following means:

(1) By mail to the Docket Management Facility (USCG-2001-10163), U.S. Department of Transportation, room PL-401, 400 Seventh Street SW., Washington, DC 20590-0001.

(2) By delivery to room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

(3) By fax to the Docket Management Facility at 202-493-2251.

(4) Electronically through the Internet Site for the Docket Management System at http://dms.dot.gov. The Docket Management Facility maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at http:// dms.dot.gov. You may obtain a copy of this proposed rule by calling the U. S. Coast Guard Infoline at 1-800-368-5647, or read it on the Internet, at the web site for the Office of Boating Safety, at http://www.uscgboating.org or at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, contact Carlton Perry, Project Manager, Office of Boating Safety, U.S. Coast Guard, by telephone at 202-267-0979 or by e-mail at cperry@comdt.uscg.mil. If you have questions on viewing or submitting material to the docket, call Dorothy Beard, Chief, Dockets, Department of Transportation, telephone 202-366-5149.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (USCG-2001-10163), indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by mail, hand delivery, fax, or electronic means to the Docket Management Facility at the address under ADDRESSES; but please submit your comments and material by only one means. If you submit them by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and want to know they reached the Facility, please enclose a stamped, self- addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting but you may submit a request for one to the Docket Management Facility at the address under ADDRESSES explaining why one would be beneficial. If we determine that a public meeting would aid this rulemaking, we will hold one at a time and place announced by a later notice in the Federal Register.

Background and Purpose

Regulatory History. The Coast Guard received requests from the National Boating Safety Advisory Council (NBSAC), propeller strike prevention organizations, and the general public to require installation of propeller guards on recreational houseboats and other displacement (non-planing) vessels, including those leased by livery operations. While accident data currently available to us does not show a high number of reported fatalities from propeller strikes annually, the number of responses to the 1995 and 1997 notices of request for comments (discussed below) indicate a great deal of public interest in whether and how the Federal government should act to prevent propeller-strike accidents. After consideration of public input and consultation with the National Boating Safety Advisory Council (NBSAC), we determined that we should promulgate regulations for owners of houseboats as non-planing recreational vessels with propeller-driven propulsion aft of the transom.

Initial Notice of Request for Comments. To gather information from the recreational boating public and industry, we published a notice of request for comments in the Federal Register in May 1995 (60 FR 25191). We asked the recreational

boating public to comment on: (1) The economic and other impacts of establishing a requirement for propeller guards on recreational houseboats and other displacement (non-planing) vessels; (2) suggestions on alternatives to propeller guards that should also be considered; (3) recommendations on the applicability of regulations; and (4) concerns of the livery and charter industries.

We received over 100 comments during the 60-day comment period. Various parties, including the National Association of State Boating Law Administrators (NASBLA) requested an extension of the comment period. To accommodate this request, we published a notice to reopen the comment period for an additional 120-days in August 1995 (60 FR 40545). We received 1,994 comments to this notice, including more than 1,800 form letters that supported a requirement to use propeller guard technology or jet pump propulsion on rental houseboats. An additional 69 comments also supported developing such a requirement. Fifty-seven comments objected to such a requirement. The information received was voluminous, but too general to help us develop a regulation.

Advance Notice of Proposed Rulemaking. We published an advance notice of proposed rulemaking (ANPRM) in March 1996 (61 FR 13123) that asked questions to gather current and specific information about the injuries involving propeller strikes and rented boats. We also announced a series of meetings across the country to enable the public to express their views. Some of the questions specifically sought out the following information: the appropriate Federal and State roles in reducing propeller strike incidents; whether government intervention is appropriate; and if so, whether it should be directed at the vessels, their

manufacturers, their operators, their owners, or the companies leasing such vessels.

Second Notice of Request for Comments. After reviewing available research and the comments from the public, and consulting with NBSAC at its November 1996 meeting, we published another notice of request for comments in April 1997 (62 FR 22991) and provided a 90-day comment period. We solicited comments on the effectiveness of specific devices and interventions that may reduce the number of recreational boating accidents involving rented powerboats in which individuals are injured by the propeller. We also asked for information about other devices or interventions (propeller injury avoidance measures) that may reduce the severity of injuries to individuals involved in propeller-strike accidents.

The devices or interventions we asked about included: (1) Swimming ladder locations and interlocks; (2) large warning notices to make the operators, passengers and swimmers more aware of the dangers; (3) propeller location wands; (4) clear vision aft to alert operators to the presence of swimmers near the propeller; (5) propeller shaft engagement alarms to alert passengers and swimmers of a rotating propeller; (6) conversion of a standard inboard, outboard, or inboard/outboard engine with a jet pump propulsion engine; (7) ignition cut-off/auto throttle and neutral returns to stop the propeller when the helm is vacated or unattended; and (8) education specifically directed to the location and dangers of propellers. We also solicited comments on propeller guards, and any other devices that might reduce the occurrence or severity of injuries due to propeller strikes. Based on requests from the public, we published a notice that extended

the comment period an additional 210 days in August 1997 (62 FR 44507).

Summary of Comments. In response to the ANPRM and the notices, we received 2,027 comments, more than 1,800 of which were form letters and none of which contained information sufficient to support proposing requirements for manufacturers of new recreational boats, nor did they help us determine the estimated burdens and costs to boat manufacturers. Of the total comments received, 95% were in favor of initiating a Federal regulation.

NBSAC Consultation. At the April 30, 2000, NBSAC Subcommittee meeting, we presented the results of our research on accident report statistics: vessels most frequently involved with injuries are open recreational motorboats in the category "16 feet to less than 26 feet in length." We announced our intention to initiate a regulatory project that would require owners of this category of recreational vessels to attach pre-printed warning labels at strategic locations on their vessels. We would also propose requirements for owners to attach a propeller guard on a smaller number of rental non-planing houseboats. The Subcommittee report included the Coast Guard rulemaking project description. The Subcommittee presented its report to the full Council at the May 1, 2000, meeting and the Council accepted the Subcommittee's report without amendment.

At the October 2000 NBSAC Subcommittee meeting, the Subcommittee reviewed the preferred alternative from its April 2000 meeting and recommended that we propose, instead, an expanded list of interventions for vessels in the category "16 feet to less than 26 feet in length." As a result, we developed and

presented a number of propeller injury avoidance measures to NBSAC for their review. Again, the full Council accepted the Subcommittee report.

At the April 2001 NBSAC Subcommittee meeting, we presented the expanded list of alternatives from which owners of the affected vessels can choose for their vessels. After discussing the alternatives and their cost, the Council recommended that the Coast Guard, instead, develop four specific regulations:

(1) Require owners of all propeller driven vessels 12 feet in length and longer with propellers aft of the transom to display propeller warning labels and to employ an emergency cut-off switch, where installed;

(2) Require manufacturers and importers of new planing vessels 12 feet to 26 feet in length with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods;

(3) Require manufacturers and importers of new non-planing vessels 12 feet in length and longer with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods; and

(4) Require owners of all non-planing rental boats with propellers aft of the transom to install either a jet propulsion system or a propeller guard or all of several propeller injury avoidance measures.

This regulatory project would focus on implementing the fourth NBSAC recommendation. We will address the other NBSAC recommendations in subsequent regulatory projects. Due to the extensive broadening of the initial regulatory project, we are withdrawing the initial regulatory project, as published in the Notices section of this document, and initiating the first of a series of separate regulatory projects in response to recent NBSAC recommendations. We have placed the public docket for the initial regulatory project (CGD 95-041) into a new public docket (USCG-2001-10299) at the Docket Management System (DMS) at the above address under ADDRESSES for public viewing.

Use of the propeller injury avoidance measures described in this proposed rule would, in most cases, prevent direct contact of the propeller blades with persons in the water and minimize serious and fatal injuries due to propeller strikes.

Discussion of Proposed Rule

1. Section 175.03 of Title 33 Code of Federal Regulations would be amended to include definitions of the following terms used in this subpart: clear vision aft, houseboat, ignition cut-off switch, non-planing vessel, planing vessel, and swim ladder interlock. We would specifically like public comment on these terms and definitions.

2. Part 175--Equipment Requirements would be revised by adding a new subpart E--Propeller Injury Avoidance Measures.

3. New section 175.301, Applicability, would describe the category of recreational vessels that are subject to the new

requirements: Non-planing recreational houseboats with propeller-driven propulsion located aft of the transom. We would specifically like public comment on definitions for terms used in this section.

4. New sections 175.310 and 175.315 would describe the specific safety measures required by this proposed rule. Section 175.310 instructs owners and operators of vessels for rent; section 175.315 instructs owners and operators of vessels not for rent.

Owner and Operator Requirements for Vessels for Rent

Under proposed section 175.310, owners of recreational, non-planing houseboats for rent with propeller-driven propulsion located aft of the transom must equip their vessels with either a propeller guard, or a combination of three propeller injury avoidance measures: A swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch. Operators of vessels for rent must use either a propeller guard or all three propeller injury avoidance measures listed above.

Owner and Operator Requirements for Vessels Not for Rent

Under proposed section 175.315, owners of recreational, non-planing houseboats not for rent with propeller-driven propulsion located aft of the transom must equip their vessels with either a propeller guard, or both of the following propeller injury avoidance measures: a swim ladder interlock and an aft visibility device.

Operators of vessels not for rent must use either a propeller guard, or all of the following propeller injury avoidance measures: a swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch (if factory installed).

We are not requiring owners of vessels not for rent to install an emergency ignition cut-off switch because it may be cost-prohibitive. However, if a vessel has an emergency ignition cut-off switch that was installed at the factory, vessel operators must use it. If a vessel does not have a factory-installed emergency ignition cut-off switch, we encourage, but do not require the owner to get one.

We would specifically like public comment on the availability of, and experience with, the safety devices described in this proposed rule. We would also like feedback about your experience operating a vessel with a propeller guard; fitting a propeller guard to a vessel drive unit; or concerns about propeller guard clogging, if any.

5. Phase-in period for installing safety measures. To minimize the immediate economic burden on owners of both rental and non-rental vessels and to provide a reasonable time period for compliance, we would provide a phase-in period for implementing the safety measures. Owners of vessels not for rent, lease, or charter would have 2 years from the date that a final rule is published to install the prescribed safety measures. Owners of vessels for rent, lease, or charter would have an additional year (3 years) from the date that a final rule is published to install the prescribed safety measures. We are allowing owners of vessels for rent an extra year because, in

many cases, they have multiple vessels on which they must install the safety measures.

Regulatory Evaluation

This proposed rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget (OMB) has not reviewed this rule under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979).

A draft Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT follows:

Costs of Proposed Rule

We estimate that this rule would impose a $12 to $30 million economic cost on owners of approximately 100,000 non-planing houseboats. Approximately 5,000 of these vessels are rented, leased or chartered.

Owners who lease, rent, or charter non-planing recreational houseboats would have to install either a propeller guard or three combined measures. The three measures include a swim ladder interlock ($100 plus installation), a clear visibility aft device ($20, self-installed), and an ignition cut-off switch ($40, plus installation). Owners of non-planing non-rental recreational houseboats would not be required to install an ignition cut-off switch. Therefore, in our calculation of the total minimum cost

to this group of owners, we have only included the cost of the other two measures.

Owners could convert their engine into a jet pump at a cost of $2500 and be exempt from this rule. Because we do not expect many houseboat owners to do this, the maximum cost is based on installation of a propeller guard, which we estimate to be $300 (self-installed).

To minimize the immediate economic impact of this rule, owners of non-rental houseboats are provided two years to comply; rental and livery businesses are granted an additional year (three years) to comply.

We estimate that costs to the government would be minimal. The Coast Guard would have to expand its Boarding Officer personnel training to include checking for installation of the injury avoidance measures, a propeller guard, or a jet pump engine in a safe and determinative manner, during currently required field boardings of recreational vessels for safety equipment checks.

Benefits of Proposed Rule

This proposed rule is appropriate because the Boating Accident Reporting Database (BARD) shows that the number of injuries and fatalities reported during calendar years 1990 through 1999 occurred at a chronic rate. BARD data for the same period revealed a total of 18 injuries and 2 fatalities involving non-planing recreational houseboats. The number of injuries to be prevented by this rule may be greatly understated

since many boaters are unaware of the requirement to report accidents.

The benefits of avoiding future propeller strike injuries and fatalities are based on the eighteen propeller strike injuries and two fatalities caused by non-planing houseboats from 1990 through 1999. If we anticipate 100% compliance with this regulation and assume the eighteen injuries to be severe, then the total monetary benefits of injuries avoided are $9.1 million. The total monetary benefits of injuries avoided are based on the value society is willing to pay to avert a severe injury, which the Office of the Secretary of Transportation has calculated to be $506,300.

In addition, two propeller-related fatalities were reported in the accident database from 1990 through 1999. If compliance with the regulation prevents these fatalities, then the total monetary benefits of fatalities avoided, based on the value society is willing to pay to avert a fatality, are $5.4 million ($2,700,000 x 2 deaths). The total monetary benefit to society for avoiding all of the injuries and fatalities involving non-planing houseboats are $14.5 million ($9.1 for injuries and $5.4 for fatalities) over a 10-year period. This exceeds our lowest cost estimates of $12 million. If at least twelve fatalities are averted due to the implementation of the regulation, the benefits will exceed our highest cost estimates of $30 million for this rule.

Vessel owners may incur additional benefits from lower insurance premiums as a result of their use of improved safety measures.

The Coast Guard expects that this rule would reduce the number of people who are killed or injured due to a propeller strike involving non-planing recreational houseboats.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

Individuals, not small entities, own the majority of non-planing recreational houseboats affected by this rule; however, under the Regulatory Flexibility Act, the Coast Guard must determine the impact on small entities. The Coast Guard estimates that there are 300 houseboat rental facilities that must install the propeller injury avoidance measures required by this rule. In order to minimize the burden on these small entities, the Coast Guard would provide them 3 years (an additional year beyond the 2 years provided to owners of non-rental houseboats) to comply with this rule.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic effect on it, please submit a comment to the Docket Management Facility at the address under ADDRESSES.

In your comment, explain why you think it qualifies and how and to what degree this rule would affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effect on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Carlton Perry, Project Manager, Office of Boating Safety, by telephone at 202-267-0979, or by e-mail at cperry@comdt.uscg.mil.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247).

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Federalism

A rule has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them

We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism. Under this proposal, the Coast Guard establishment of a performance standard or equipment installation requirement would not conflict with any existing State statute. The Coast Guard routinely consults with the National Association of State Boating Law Administrators (NASBLA) and will continue to do so on this specific regulatory project.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive

Order 12630, Governmental Actions and Interfe ıce with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the Federal Register (66 FR 36361, July 11, 2001) requesting comments on how to best carry

out the Order. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a "tribal implication" under the Order.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Environment

We have considered the environmental impact of this proposed rule and concluded that, under figure 2-1, paragraph (34)(d), of Commandant Instruction M16475.1D, this proposed rule is categorically excluded from further environmental documentation. The proposed rule requires owners of non-planing recreational houseboats with propeller-driven propulsion located aft of the transom to install one of two propulsion unit measures or three combined measures. The propeller guard devices do not create sufficient drag through the water for these slow moving non-planing vessels to result in an increase of consumption of fossil fuels or increase air pollution due to increased exhaust. A "Categorical Exclusion

Determination" is available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 175 Marine Safety.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 175 as follows:

PART 175 – EQUIPMENT REQUIREMENTS

1. The authority citation for part 175 continues to read as follows:

Authority: 46 U.S.C. 4302; 49 CFR 1.46.

2. Amend § 175.3 by adding the following undesignated definitions in alphabetical order to the rest of the section, to read as follows:

§ 175.3 Definitions.

* * * * *

Clear visibility aft device means a device, such as a video camera and monitor or a mirror, that allows the operator to see aft of the vessel from the engine throttle control station to be aware of the presence of a swimmer near a propeller.

Houseboat means a motorized vessel designed primarily with accommodation spaces with little or no foredeck or cockpit, with low freeboard and with a low length to beam ratio.

Ignition cut-off switch means a device that interrupts the engine ignition to stop the engine when the operator moves away from the engine throttle control station.

* * * * *

Non-planing vessel means a vessel with a hull that is designed to ride through the water at any speed.

* * * * *

Planing vessel means a vessel with a hull that is designed to ride on top of the water beyond a minimum speed.

* * * * *

Swim ladder interlock means a device that interrupts the engine ignition to stop the engine when a swim ladder is moved into position near the propeller.

* * * * *

3. Amend part 175 by adding a new subpart E – Propeller Injury Avoidance Measures as follows:

Subpart E – Propeller Injury Avoidance Measures § 175.301 Applicability.

§ 175.310 Propeller safety measures for rental houseboats.

§ 175.315 Propeller safety measures for non-rental houseboats.

§ 175.301 Applicability.

(a) Sections 175.310 and 175.315 apply to recreational vessels described in § 175.1, which:

(1) Are monohull houseboats;

(2) Use a propulsion drive unit with an exposed propeller located aft of the transom; and

(3) Are designed to be operated in a non-planing manner.

(b) Sections 175.310 and 175.315 do not apply to multi-hull vessels or planing vessels.

§ 175.310 Propeller safety measures for rental houseboats.

(a) If you own a recreational non-planing houseboat and provide it for rent, charter or lease, you must either–

(1) Cover each exposed propeller located aft of the transom with a propeller guard attached in a secure manner; or;

(2) Do all of the following–

(i) Install and maintain an interlock device for each swim ladder;

(ii) Install and maintain a clear visibility aft device that provides a clear view, aft of the vessel from the engine throttle control area; and

(iii) Install and maintain an emergency ignition cut-off switch.

(b) If you operate a rented, chartered, or leased vessel that has an exposed propeller located aft of the transom, you must –

(1) Use all swim ladder interlock devices;

(2) Use a clear visibility aft device that provides a clear view, aft of the vessel from the engine throttle control station; and

(3) Use the emergency ignition cut-off switch.

§ 175.315 Propeller safety measures for non-rental houseboats.

(a) If you own a recreational non-planing houseboat and do not provide it for rent, charter or lease, you must either –

(1) Cover each exposed propeller located aft of the transom with a propeller guard attached in a secure manner; or

(2) Do both of the following –

(i) Install and maintain an interlock device for each swim ladder; and

(ii) Install and maintain a clear visibility aft device that provides a clear view, aft of the vessel from the engine throttle control station.

(b) If you operate a vessel with an exposed propeller located aft of the transom, you must –

(1) Use all swim ladder interlock devices;

(2) Use a clear visibility aft device that provides a clear view, aft of the vessel from the engine throttle control area; and

(3) Use the emergency ignition cut-off switch (if factory installed).

Dated: October 15, 2001.

Terry M. Cross,
Rear Admiral, U.S. Coast Guard, Assistant Commandant for Operations.

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Supreme Court, U.S.
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MAR 29 2002
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(7)

No. 01-706

IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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6788

QUESTION PRESENTED

Whether federal law preempts state common-law claims that a recreational motor boat engine was defectively designed because it lacked a propeller guard when: (1) the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311, expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); and (2) the U.S. Coast Guard has not prescribed any regulations with respect to propeller guards.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1-22) is reported at 757 N.E.2d 75 (Ill. 2001). The opinion of the appellate court (Pet. App. 23-38) is reported at 729 N.E.2d 45 (2000). The unreported order of the trial court (Pet. App. 39) was entered on November 20, 1998.

JURISDICTION

The decision of the Illinois Supreme Court was filed on August 16, 2001. This Court granted the petition for a writ of certiorari on January 22, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS

This case involves the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (the "Boat Safety Act" or "Act"). Relevant portions of the Act are in an appendix to this brief.

STATEMENT OF THE CASE

The question presented is whether state common-law claims that a boat engine was defectively designed because it lacked a propeller guard are preempted by the Boat Safety Act or by a decision of the U.S. Coast Guard not to try to develop a regulation that would have required propeller guards on recreational motor boats. The Illinois Supreme Court held that such claims are impliedly preempted, even though the Coast Guard has never regulated propeller guards and even though the United States, in an *amicus curiae* brief filed with this Court in *Lewis v. Brunswick Corp.*, No. 97-288 (October Term 1997), *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998), took the position that claims exactly like

petitioner's are not preempted by federal law.[1] The lower court's finding was clearly in error, as petitioner's claims are expressly preserved by the Boat Safety Act and do not in any way frustrate the goals of either Congress or the U.S. Coast Guard.

At the outset, we note that this case has enormous implications for the rights of the States to compensate tort victims through the common law. The agency "action" at issue here was a 1990 decision by the U.S. Coast Guard *not* to take any regulatory action involving propeller guards. That decision, which was set forth in a letter from a Coast Guard official to the Chairman of the Coast Guard's own Advisory Council, was never made the subject of any notice-and-comment rulemaking and never published in the *Federal Register*. Since that time, moreover, the agency has never taken the position that common-law claims are preempted in this area – and, in fact, the United States has taken the formal position (in *Lewis*) that such claims are *not* preempted. Finding preemption under these circumstances, where the States were given no notice of a possible restriction of their historic right to compensate victims through their tort systems – let alone an opportunity to comment on the propriety of such a restriction – would directly undermine the role of the States as separate sovereigns in our federal system. This Court should not tolerate such a result.

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[1] In *Lewis*, the United States argued that (1) common-law claims involving propeller guards are not expressly preempted because the Boat Safety Act's preemption clause, 46 U.S.C. § 4306, does not include common-law claims and its savings clause, 46 U.S.C. § 4311(g), expressly preserves them (U.S. Brief at 12-25); and (2) such claims are not impliedly preempted because, *inter alia*, the Coast Guard has never regulated propeller guards (although it retains the authority to do so) and never found such devices to be contrary to the interests of boat safety. *Id.* at 25-26. *Lewis* settled after oral argument, before any decision was rendered in the case.

A. The Federal Statutory And Regulatory Framework.

1. The Boat Safety Act.

The Boat Safety Act of 1971 was enacted to authorize the creation of federal safety standards for recreational boats used on navigable waters of the United States. At the time of enactment, "[o]ver 40 million Americans [were] engage[d] in recreational boating each year in approximately 9,000,000 boats," with usage "increasing at the rate of about 4,000 per week . . ." S. Rep. No. 248, 92d Cong., 1st Sess. (1971) ("Senate Report"), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1334. This increase in recreational boating was accompanied by a marked increase in "accidents, deaths and injuries." *Id.* at 1334. Congress estimated that, "[i]n the last five years, nearly 7,000 Americans have died in boating mishaps." *Id.*

Congress recognized that the lack of adequate federal regulation contributed to the hazards of recreational boating. As of 1971, there were only "[t]wo laws . . . in existence that affect[ed] the noncommercial boat users on the navigable waters of the United States." H. R. Rep. No. 324, 92d Cong., 1st Sess. (1971) ("House Report"), at 1. These two laws – the Motor Boat Act of 1940, 54 Stat. 165, and the Federal Boating Act of 1958, 72 Stat. 1754 – imposed limited requirements principally relating to lighting, fire extinguishers, and boat numbering, and did not authorize the creation of federal construction or design standards. In 1971, Congress concluded that "[t]hese two acts do not meet current requirements of safe boating." House Report at 9. *See also* Senate Report at 1335 ("the 1940 Act and the 1958 Act are not together adequate to meet today's needs").

To address the inadequacies in existing law, Congress decided, "for the first time," to enact a law that would address "the subject of safety for boats used principally for other than commercial use" – *i.e.*, recreational vessels. House Report at 2; Senate Report at 1333. The "major thrust" of the legislation was to grant the Coast Guard the authority to promulgate design and construction standards for recreational boats. House Report at 2. Congress observed that "[s]imilar authority" already existed with respect to aircraft and motor vehicles. *See id.* at 2; Senate Report at 1334. Congress further noted that, although "safety standards and requirements for certain categories of larger commercial vessels have existed for many years," Senate Report at 1334, recreational vessels had never before been a focus of federal law.

Against this backdrop, the Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating – presently the Secretary of Transportation." *Id.* at 1333. The Act, which applies to "recreational vessel[s] . . . on waters subject to the jurisdiction of the United States . . . ," 46 U.S.C. § 4301(a), provides that the Secretary of Transportation "*may* prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). This rulemaking authority has been delegated to the Commandant of the United States Coast Guard. 49 C.F.R. § 1.46(n)(1). Although manufacturers are subject to civil and criminal penalties for the violation of Coast Guard safety standards, *see* 46 U.S.C. § 4311, the Act does not establish any mechanisms for compensating persons injured by unsafe boats.

Under the Act, the Coast Guard's authority to issue minimum safety standards is "permissive and not mandatory." Senate Report at 1338. *See* 46 U.S.C. § 4301(a)(1). Moreover, the Act sets out a number of limitations on the circumstances under which the Coast Guard may exercise its rulemaking authority. Among other things, the Act prohibits the Coast Guard from establishing regulations that would "compel substantial alteration" of existing "recreational vessel[s]" unless the Coast Guard makes a determination that the regulation is necessary to "avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct." 46 U.S.C. § 4302(c)(2).

In addition, before establishing any safety regulations, the Coast Guard is required to consult with the National Boating Safety Advisory Council (the "Advisory Council"). *See* 46 U.S.C. § 4302(c)(4). The Advisory Council does not include any federal officials; rather, it is comprised of seven State boating officials, seven industry representatives, and seven members from national recreational boating organizations and from the general public. *See* 46 U.S.C. § 13110. Congress further specified that Advisory Council members are not "officer[s] or employee[s] of the United States Government for any purpose." 46 U.S.C. § 13110(d).

Finally, before issuing any regulations under the Act, the Coast Guard must comply with the formal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553, which requires public notice and comment on a rule before it becomes effective. *See* Senate Report at 1340. Under this scheme, any party adversely affected by a standard prescribed under the Boat Safety Act is entitled to seek judicial review of

the standard in accordance with the Administrative Procedure Act. *Id.*

The Act also contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included a preemption clause providing, in pertinent part, that:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an anti-preemption provision, or savings clause, providing that:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g). Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not To Regulate Propeller Guards.

a. The Subcommittee Investigation. In May 1988, at the request of the U.S. Coast Guard, the Advisory Council appointed a five-person subcommittee (the "Subcommittee") to

"[a]ssess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public." J.A. 43. *See also* J.A. 12. The Subcommittee, which consisted of one Coast Guard representative, one state member, one industry representative, and two members of the public, was also charged with considering whether the Coast Guard should "move towards a federal requirement for some form of propeller guard" on recreational boats. J.A. 43.

In November 1989, the Subcommittee recommended that the Coast Guard "take no regulatory action to require propeller guards." *See* Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council dated November 7, 1989 ("Subcommittee Report"), J.A. 12-71. According to the Subcommittee Report, propeller guards were already in use on certain vessels, including amusement park boats, rescue vessels used in other countries, and on landing boats used by the U.S. Marines and the U.S. Navy. J.A. 30-31. The Subcommittee Report said, however, that although propeller-guards were "feasible" for some boats, the devices could "affect boat operation adversely" and "create new hazards" under certain circumstances. J.A. 36-39. The Subcommittee Report further concluded that the majority of underwater-impact injuries were attributable to factors unrelated to unguarded boat propellers, such as contact with other parts of the boat. J.A. 39. The Subcommittee also found that there was no universal solution to the problem of unguarded boat propellers:

> Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable

> for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive costs.

J.A. 38. As a result, the Subcommittee Report concluded, "[a]lthough the controversy which currently surrounds the issue of propeller guarding is, by its very nature, highly emotional and has attracted a great deal of publicity, there are no indications that there is a generic or universal solution currently available or foreseeable in the future." J.A. 40.

At the time it issued this recommendation, the Subcommittee was aware of on-going litigation involving injuries caused by unguarded boat propellers. The Subcommittee Report specifically noted that "[a] number of law suits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat" (J.A. 17), and included a detailed discussion of the various "legal theories" and factual disputes involved in these cases. J.A. 17-20. In addition, the majority of the individuals that appeared before the Subcommittee during the course of its investigation had served as expert witnesses in propeller-guard litigation (the bulk of these witnesses had testified on behalf of boat industry defendants). J.A. 15-16. The Subcommittee Report, however, contains no mention of federal preemption or any suggestion that the Coast Guard should even consider preempting future lawsuits involving propeller guards.

On November 7, 1989, the Advisory Council accepted the Subcommittee Report and adopted its recommendation that no regulatory action be taken with respect to propeller guards, J.A.

72-79. However, in response to concerns expressed by a propeller-strike accident victim that "it is obvious that all related information is not in yet . . ." (J.A. 78), the Chairman "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." J.A. 79.

b. The Coast Guard's Decision. The Coast Guard, in turn, adopted the Advisory Council's recommendation that it "take no regulatory action to require propeller guards." J.A. 80. Although the agency did not take any formal action in this regard, the Coast Guard's Chief of the Office of Navigation and Safety and Waterway Services – Rear Admiral Robert T. Nelson – wrote a letter to the Chairman of the Advisory Council setting forth the rationale underlying the agency's decision not to begin the formal regulatory process. J.A. 80-84 (the "Coast Guard Letter"). The Coast Guard Letter stated:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

J.A. 80. Rear Admiral Nelson added, however, that the agency would "continue to collect and analyze accident data for changes and trends . . . [and] review and retain any information made available regarding *development and testing of new propeller guarding devices* or other information on the state of

the art." J.A. 81 (emphasis added). He further stated that the Coast Guard intended to publish "a series of articles in our Boating Safety Circular . . . aimed at avoiding boat/propeller strike accidents. Topics could include, for example, . . . *available propeller guards* . . .." J.A. 83 (emphasis added).

At no point did the Coast Guard Letter – or anything else issued by the agency – indicate that it had concluded that propeller guards might be dangerous. None of the Subcommittee Report's statements about the dangers of propeller guards was reiterated or endorsed in the Coast Guard Letter. In addition, although the Subcommittee's investigation was prompted in part by numerous lawsuits filed by propeller-strike victims against boat engine manufacturers (J.A. 17), the Coast Guard Letter does not mention these lawsuits or indicate in any way that the agency intended to preempt common-law claims relating to propeller guards.

Neither the Subcommittee Report nor the Coast Guard Letter was ever published in the *Federal Register* or made the subject of any formal regulatory action. Thus, there was no attempt to conform to the rulemaking requirements of either the Boat Safety Act, *see* 46 U.S.C. § 4302, or the Administrative Procedure Act. *See* 5 U.S.C. § 553. To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

c. Subsequent Developments. The Coast Guard has, however, continued to investigate whether to require the use of propeller guards on recreational motor boats. In 1995, the Coast Guard issued an Advance Notice of Proposed Rulemaking ("ANPRM") requesting comment on "the public's present feelings about the use of propeller guards or possible alternatives to propeller guards" on recreational houseboats and

other "displacement-type (non-planing) vessels." *See* 60 Fed. Reg. 25,191 (1995), J.A. 85. In 1996, the Coast Guard issued another ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13,123 (1996), J.A. 90. In 1997, the Coast Guard sought "comments on the effectiveness and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991 (1997). J.A. 100.

Finally, in December 2001, the Coast Guard proposed a rule that would require owners of all "non-planing" rental vessels to install "either a propeller guard or a combination of three other propeller injury avoidance measures: A swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch." 66 Fed. Reg. 63,645 (2001), J.A. 141. In the preamble to the proposed rule, the Coast Guard stated that it intends to initiate "subsequent regulatory projects" to address an Advisory Council recommendation that the agency require manufacturers and importers of all new "planing" vessels 12 to 26 feet – such as the motor boat that killed petitioner's wife – and all new non-planing vessels 12 feet and longer "to install one of several factory installed propeller injury avoidance measures." J.A. 139-40.

B. The Proceedings Below

This case arose out of a boating accident in Tennessee in which the petitioner's wife, Jeanne Sprietsma, fell from a motor boat and was struck by the motor's propeller blades. J.A. 100-102. As a result, she suffered serious injuries and later died. J.A. 102. The boat was equipped with an outboard motor that did not have a propeller guard. J.A. 101-102. The motor was

designed, manufactured, and sold by respondent Mercury Marine, a division of Brunswick Corporation. J.A. 100-101.

Petitioner Rex Sprietsma is the administrator of the estate of his deceased wife. J.A. 102. He filed a wrongful death and survival action against Mercury Marine in the Circuit Court of Cook County, Illinois seeking to recover damages based on negligence and strict liability for his wife's pain and suffering, along with the financial losses suffered by him and his son. J.A. 100-122. The complaint alleged, among other things, that the boat engine was defectively designed because it was not equipped with a propeller guard. J.A. 102.

Respondent moved to dismiss on the ground that Mr. Sprietsma's claims are preempted by the Boat Safety Act and by the Coast Guard's decision not to regulate propeller guards. The trial court granted the motion to dismiss (Pet. App. 39) and the intermediate appellate court affirmed, finding that petitioner's claims are expressly preempted by the Boat Safety Act. Pet. App. 34.

On appeal, the Illinois Supreme Court rejected the appellate court's express preemption ruling, but held that petitioner's claims are impliedly preempted by federal law. Pet. App. 16. At the outset, the court held that the case is not subject to the strong presumption against federal preemption that ordinarily applies to health and safety issues. Pet. App. 5 Relying on *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to cases involving international maritime commerce, the court declined to apply any presumption against preemption on the theory that "federal concerns predominate in this case." Pet. App. 6.

The lower court then considered the questions of express and implied preemption under the Boat Safety Act. Regarding the former, the court concluded that the Act's broadly-worded savings clause, which provides that "[c]ompliance with this chapter . . . does not relieve a person from liability at common law or under State law," precludes any finding of express preemption of common-law claims. Pet. App. 9-10. The court went on to hold, however, that petitioner's claims are impliedly preempted on the theory that a jury verdict finding Mercury Marine liable for not installing a propeller guard would "frustrate" federal purposes. Pet. App. 16. Despite its acknowledgment that the Coast Guard has never issued any regulations governing propeller guards, the court found that the agency's regulatory *inaction* amounted to an affirmative decision to preclude any common-law claims seeking to hold a manufacturer liable for failing to install propeller guards. *Id.*

SUMMARY OF ARGUMENT

This case is governed by the strong presumption against preemption that this Court has repeatedly applied in cases involving the States' historic right to protect the health and safety of their citizens and compensate victims through their tort systems. *See, e.g., Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). This Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that the presumption against preemption does not apply to state laws regulating the design features of ocean-going oil tankers used in national and international maritime commerce, does not suggest a different result. None of the federal interests at stake in *Locke* – particularly the federal government's long-standing interest in regulating commercial vessels used in international trade – is implicated in this case, which involves the design features of a

small recreational vessel that, until recently, were not even within the scope of any federal regulatory authority.

Even assuming, however, that *Locke* altered the traditional presumption against preemption applicable to common-law tort claims, petitioner's claims are not preempted. First, the Boat Safety Act does not expressly preempt *any* common-law claims. The plain language of the Act's preemption clause – 46 U.S.C. § 4306 – shows that Congress only expressly preempted state *legislative* or *administrative* safety standards in the boat safety area, and not common-law claims. Any doubt on this point would be dispelled by the Act's broadly-worded savings clause, which states in sweeping and unambiguous terms that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Both the text of this "anti-preemption" provision and its legislative history leave no room for a conclusion that petitioner's claims are expressly preempted by the Safety Act. *See Geier v. American Honda Co.*, 529 U.S. 861, 868 (1999).

Nor is there any basis for the lower court's conclusion that petitioner's claims are impliedly preempted because they frustrate federal purposes. First, this lawsuit is entirely consistent with the goals of the Boat Safety Act, since Congress made clear (in the Act's savings clause) that the preservation of common-law claims would *aid* the accomplishment and execution of its full purposes. Congress recognized that federal regulations and common-law liability can and should work together to create safer recreational boats. Given Congress' expressed desire to preserve common-law claims, petitioner's lawsuit would not undermine the purposes of the Act. In fact, because the Act limits the Coast Guard's authority to the promulgation of actual rules under 46 U.S.C. § 4302, affording

preemptive effect to the agency's regulatory *in*action would actually *frustrate* Congress' purposes.

Petitioner's claims also are not inconsistent with any of the Coast Guard's regulatory goals. First and foremost, because the agency has never promulgated any regulations governing propeller guards, there is no federal standard with which a state common-law action could possibly conflict. The Coast Guard remains free, moreover, to promulgate any regulations in this area in the future, if the appropriate justifications exist. Nothing about petitioner's lawsuit could possibly conflict with or undermine this grant of rulemaking authority.

This lawsuit also does not conflict with any specific agency determination regarding propeller guards. The Coast Guard has never given any indication of an intent to preempt common-law claims like petitioner's. Nor has the agency ever found that propeller guards are inconsistent with boat safety. To the contrary, in its unpublished letter setting forth the agency's decision not regulate propeller guards, the Coast Guard not only declined to mention the alleged hazards of propeller guards, but it affirmatively stated that propeller guards were "available" and could play a role in helping to prevent propeller-strike accidents – observations that are flatly inconsistent with any notion that the agency found propeller guards to be dangerous or intended to preempt common-law claims in this area.

This Court's teachings regarding the preemptive effect of regulatory inaction confirm that petitioner's claims must be permitted to go forward. Although the Court has sometimes found state law preempted in the absence of an applicable federal standard, it has only done so when Congress had fully occupied the regulated field at issue (or made clear its intent that the field remain unregulated). Where, as here, federal law

has *not* fully occupied the regulatory field, the Court has made clear that, absent some "extant action" from which a preemptive inference can be drawn, "preemption, if it is intended, must be explicitly stated." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum*, 485 U.S. 496, 503 (1988). This test cannot be met here, because the Coast Guard has never regulated propeller guards or said a word about preemption, and the Boat Safety Act explicitly preserves common-law claims. That being so, this case is governed by *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), where this Court held – in the context of a statute that, like the Boat Safety Act, expressly preserves common-law claims – that the absence of a federal safety standard precludes any finding of implied conflict preemption.

ARGUMENT

I. This Case Is Governed By A Strong Presumption Against Preemption.

To begin with, this case is governed by a strong presumption against preemption of state law. As this Court recently explained, where "Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purposes of Congress." *Medtronic*, 518 U.S. at 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). This presumption is at its strongest when the question is, as here, whether Congress intended to prohibit the States from protecting the health and safety of their citizens through the exercise of such traditional and core police powers as the provision of common-law tort remedies. *Id. See also Hawaiian Airlines, Inc., v. Norris*, 512

U.S. 246, 252 (1994); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone*, 505 U.S. at 516. In this connection, whether the federal statute provides "any substitute for the traditional court procedure for collecting damages for injuries caused by tortious conduct" – as the Boat Safety Act does not – is particularly significant. *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656, 663-64 (1954); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). In the absence of such a substitute, plaintiffs who could prove that their physical injuries resulted from the wrongful conduct of defendants under state law would be left wholly without any remedy – a result that should not readily be attributed to Congress.

Contrary to the lower court's holding, this Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), which involved state regulation of the operation and design of ocean-going oil tankers used in international commerce, does not suggest a different result here with regard to the presumption against preemption. *Locke* held that, in a case where "[t]he state laws in question bear upon *national and international maritime commerce*, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.* at 108 (emphasis added). A presumption against preemption is inappropriate in such cases, this Court reasoned, given that "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.* The Court also expressed concern that state regulations governing international ocean-going oil tankers would undermine "the substantial foreign affairs interests of the Federal Government." *Id.* at 97.

Locke's holding has no bearing here for several reasons. First, in contrast to the long-standing statutory and regulatory

scheme at issue in *Locke* governing commercial vessels, *see id.* at 108, the federal government's involvement in regulating noncommercial boat design is of relatively narrow scope and markedly recent vintage.[2] This fact alone renders inapposite *Locke*'s holding that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a *history of significant federal presence*." 529 U.S. at 108 (emphasis added).

Second, this case in no way implicates the foreign affairs concerns paramount in *Locke*. There, this Court emphasized that the "scheme of regulation" governing oil tankers "includes a significant and intricate complex of international treaties and maritime agreements bearing upon the licensing and operation of vessels." *Id.* at 102.[3] In that context, where the state laws at

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[2] As explained above, prior to the passage of the Boat Safety Act, Congress had never attempted to regulate the design aspects of noncommercial vessels. As of 1971, only two laws – the Motor Boat Act of 1940 and the Federal Boating Act of 1958 – "affect[ed] the noncommercial boat users on the navigable waters of the United States" (House Report at 1), and those laws were highly limited in scope, dealing principally with safety equipment and boat numbering. Congress recognized this fact, and sought to fill the void by passing, "for the first time," federal legislation that authorized the Coast Guard to regulate the design features of recreational boats. House Report at 2.

[3] As co-petitioner in the case, the United States emphasized that the state laws at issue "differ from the international . . . regulatory regime in numerous ways," and that enforcement of these laws "raises the distinct possibility that other nations that are parties to international conventions and agreements will regard the United States in violation of its obligations and thus take actions that will undermine international uniformity." *United States v. Locke*, Case Nos. 98-1701, 98-1706, Brief for the United States at 12, 45. These sentiments were joined by "the governments of 13 ocean-going nations[, who] expressed their concerns [about conflicting state

issue threatened directly to impinge on the United States' treaty obligations with foreign countries, it made perfect sense for *Locke* to reject any application of the presumption against preemption of state law. These international concerns, however, are not present here, because this case involves the design features of a small recreational vessel that will never be used in international commerce. *Locke* is inapplicable for this reason, as well.[4]

The lower court nonetheless jettisoned the presumption against preemption on the ground that "the claims in this case relate to federal maritime activity . . .." Pet. App. 6. In so holding, the lower court relied on *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 (1982), which held that a collision between two pleasure boats on navigable waters had a sufficient nexus to traditional maritime activity to come within the admiralty jurisdiction of the federal courts. That the federal courts possess admiralty jurisdiction over some maritime torts involving recreational boats does not, however, strip the States of their interest in ensuring that the victims of maritime torts be compensated for their injuries. In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), for example, this Court held that the family of a young woman killed in a jet ski accident was entitled to seek damages for her

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regulations] through a diplomatic note directed to the United States." 529 U.S. at 97.

[4] *See Allen-Bradley Local No. 1111 v. Wisc. Empl't Relations Bd.*, 315 U.S. 740, 749 (1942) ("we were more ready to conclude that a federal act in a field that touched international relations superseded State regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and the use of streets and highways").

wrongful death under state law. *Id.* at 202. Although the Court did not decide whether state law would ultimately supply the liability standard governing the wrongful death case, *see id.* at 216 n.14, *Yamaha* shows that, even in the maritime area, the states retain a powerful interest in compensating the victims of hazardous products – an interest that has always been central to this Court's decisions applying the presumption against preemption of state law. *See, e.g., Medtronic*, 518 U.S. at 485.

In addition, numerous prior decisions of this Court have made clear that, absent a direct conflict with federal law, States' "police powers" in the areas of health and safety may be exercised concurrently with the federal government's jurisdiction over maritime matters. *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Kelly v. State of Washington*, 302 U.S. 1 (1937). Thus, as this Court observed in *Yamaha*, "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters." 516 U.S. at 215 n.13. To this end, "States have . . . traditionally contributed to the provision of environmental and safety standards for maritime activities." *Id.* (collecting cases).

Against this backdrop, there is no justification for disregarding the presumption against preemption. Not only does the federal interest here pale in comparison to that at issue in *Locke*, but the States' interest in exercising their police powers to protect health and safety is a powerful one, even in the maritime context. In case after case, this Court has applied the presumption against preemption to protect the State's exercise of its traditional police powers, notwithstanding an arguably strong countervailing federal interest in the subject

matter at hand.[5] There is no reason to abandon this presumption here simply because this case involves the design features of a recreational boat engine that, until fairly recently, were not even within the regulatory jurisdiction of any federal agency.

II. Petitioner's Claims Are Not Expressly Preempted.

The lower court held that the Boat Safety Act's savings clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law," 46 U.S.C. § 4311(g), precludes any finding of express preemption in this case. *See* Pet. App. 9. In so ruling, the lower court relied on *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (1999), which construed a similarly-worded savings clause in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (the "Motor Vehicle Safety Act"), as precluding any express preemption of common-law claims.[6]

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[5] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 2414 (2001) (cigarettes); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (medical devices); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993) (railroad crossings); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (cigarettes); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (nuclear power); *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 714, 718 (1985) (blood plasma); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (food labeling); *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940) (highway safety); *H.P. Welch & Co. v. State of New Hampshire*, 306 U.S. 79, 85 (1939) (highway safety); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 610 (1926) (locomotive equipment).

[6] *See also Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598 (5th Cir. 2000), *cert. denied sub nom. Lady v. Outboard Marine Corp.*, 121 S. Ct.

We agree that *Geier*'s holding regarding the savings clause in the Motor Vehicle Safety Act definitively resolves any question of express preemption in this case and effectively overrules the various pre-*Geier* decisions holding that the Boat Safety Act expressly preempts common-law claims like petitioner's.[7] This point is addressed *infra* at II(B). However, to ensure that this Court has the benefit of full briefing on the express preemption issue, we also address the text of the Act's express preemption clause – 46 U.S.C. § 4306 – here. As explained below, even without the savings clause, it is clear that Section 4306 does not encompass common-law claims.

As a threshold matter, we note that Section 4306 is susceptible of at least two interpretations regarding the Boat Safety Act's effect on state *positive law* – *i.e.*, legislation and regulations. The preemption clause provides that,

> [u]nless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or

1402 (2001) (holding that *Geier* precludes any finding of express preemption under the Boat Safety Act).

[7] *See Carstensen v. Brunswick Corp.*, 49 F.3d 430, 433 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Mowery v. Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner v. Brunswick Corp.*, 239 Ill. App. 3d 885, 891-92 (Ill. 1992); *Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 551 (Mich. 1997). Since *Geier*, no court has held that the Boat Safety Act expressly preempts common-law claims.

> associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . *that is not identical to a regulation prescribed under section 4302 of this title*.

Id. (emphasis added). One interpretation of this language is that, absent the grant of an exemption from the Coast Guard, the *only* action the States can take in the field of recreational boat safety is to pass laws or regulations that are "identical to" pre-existing federal regulations. Under this reading of Section 4306, state positive law may be preempted even where – as here – there is no federal regulation governing the design features at issue.

A second – and far more plausible – interpretation is that Section 4306 only limits what a State can do in the event the Coast Guard *has* prescribed a federal regulation (the State is limited to prescribing an "identical" regulation); it does not affect what a State can or cannot do where the Coast Guard has *not* promulgated a federal regulation. This interpretation is supported by the fact that the Congress merely gave the Coast Guard permissive authority to promulgate minimum safety standards for recreational boats. *See* 46 U.S.C. § 4302(a) ("[t]he Secretary *may* prescribe regulations . . . establishing minimum safety standards for recreational vessels and associated equipment . . ."). (emphasis added). That the Coast Guard is not required to issue *any* standards under the Act is inconsistent with the notion that Congress intended to preempt the entire field of state positive law in this area.[8]

[8] *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-72 (1978) (because Title I of the Ports and Waterway Safety Act (the "PWSA") "merely authorizes and does not require the Secretary [of Transportation] to issue regulations" governing vessel traffic, it does not preempt the field of

Under this reading of Section 4306, the fact that the U.S. Coast Guard has not issued any regulations with respect to propeller guards definitively resolves the express preemption question in petitioner's favor. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (unanimous holding that common-law claims involving a manufacturer's failure to install antilock brakes in trucks are not expressly preempted by the Motor Vehicle Safety Act because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers."). *Cf. Medtronic*, 518 U.S. at 494 (majority opinion); *id.* at 508 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 513 (O'Connor, J., concurring in part and dissenting in part) (unanimous holding that common-law claims alleging that heart pacemakers were defectively designed are not preempted by Medical Device Amendments of 1976 because the federal agency had not promulgated any standards governing the design of these devices).

This Court need not resolve this issue, however, because even if Section 4306 preempts state positive laws in the absence of a federal regulation, it does not expressly preempt common-law claims under any circumstances. This is made clear both by the text of Section 4306 and by the Act's savings clause, 46 U.S.C. § 4311(g), which expressly *preserves* common-law claims.

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state positive law). *Cf. id.* at 168 (because Title II of the PWSA *obligates* the agency to promulgate rules regarding tanker design and operation, the statute "leaves no room for the states to impose different or stricter design requirements than those which Congress has enacted . . ."). *See also U.S. v. Locke*, 529 U.S. 89 (2000) (reaffirming *Ray*'s analysis of the preemptive scope of Titles I and II of the PWSA).

A. The Act's Preemption Provision Does Not Encompass Common-Law Claims.

The plain wording of Section 4306 shows that Congress did not expressly preempt common-law claims. To begin with, Section 4306 only preempts any "*law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306 (emphasis added). Perhaps the most notable feature of this provision is the absence of any reference to common-law claims. Congress has shown its ability to refer to "common law" when it intends to include it within the scope of a preemption clause.[9] Indeed, the reference to "common law" in the Act's savings clause, 46 U.S.C. § 4311(g) (*see infra* at II(B)), shows that Congress was cognizant of common law *in this very piece of legislation*, thereby defeating any notion that Congress intended the preemption provision to encompass common-law claims. *See, e.g., Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (internal quotation marks omitted).

Even the broadest reading of Section 4306 ultimately breaks down, however, in light of other aspects of the preemption provision which show that Congress did not

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[9] *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (preempting rights "under the common law, rule, or public policy"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (preempting any "State constitution, statute, court decree, common law, rule or public policy").

preempt tort suits against boat manufacturers. *First*, the Act merely preempts state "law[s] or regulation[s]" that are not identical to federal requirements. Although "law," standing alone, is susceptible to a broad reading, "[l]anguage . . . cannot be interpreted apart from context." *Smith v. United States*, 508 U.S. 224, 229 (1993). Here, the term "law" does not stand in isolation, but rather as a counterpart to the word "regulation," which is a prescriptive requirement promulgated by an administrative rather than legislative body. Indeed, this Court in *Cipollone* repeatedly noted that the word "regulation" is a reference only to positive law and not to common-law duties or damages liability. *See* 505 U.S. at 504, 519, 523. Thus, if "a word is known by the company it keeps," *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted), and if this Court is to adhere to the oft-stated "assum[ption] 'that the legislative purpose is expressed by the ordinary meaning of the words used,'" *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)), the phrase "law or regulation" cannot plausibly be read to encompass the damages claims in Mr. Sprietsma's suit.[10]

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[10] The reference to "requirement" in the preemption clause does not suggest a different result. Although this Court in *Cipollone* found preemption of common-law claims by a statute that broadly preempted any "requirement or prohibition . . . imposed under state law," 505 U.S. at 520, Section 4306 is very different. First, unlike the 1969 Act at issue in *Cipollone*, Section 4306 does not preempt "requirements" at all; rather, it preempts a "law or regulation . . . *imposing* a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). Thus, the word "requirement" in the Boat Safety Act is merely used to describe the *type* of "law or regulation" that is preempted by federal law; it is not, as in *Cipollone*, intended to designate an entirely separate category of items that are subject to preemption. Second, unlike the 1969 Act in *Cipollone*, Section 4306 contains no broad reference to preempting the entire body of "state law" – a term that this Court held could be read to encompass common law claims. *See* 505 U.S. at 515. Third, unlike the Boat Safety Act, the

Second, the preemption provision only prohibits a State from imposing a nonidentical "law or regulation establishing . . . a performance or other *safety standard* or imposing a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). "Safety standard" is a term used at various places in the Act to refer to the *administrative* standards the Coast Guard is authorized to adopt pursuant to Section 4302. *See, e.g.*, *id.* at §§ 4302(a)(1), 4302(a)(2), 4304, 4311(f)(1), and 4311(f)(2). The use of the same term to refer to the state norms that may be displaced by a federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is a "basic canon of statutory construction that identical terms within an Act bear the same meaning") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("a word is presumed to have the same meaning in all subsections of the same statute"). Thus, the only sensible reading of the Act's preemption provision is that a "safety standard" promulgated under the Act (or a requirement for equipment associated with such a standard) will only preempt state *legislative* or *administrative* "safety standards" – and not common-law claims.

Third, the preemption provision only applies to a safety standard "establish[ed], continue[d] in effect, or enforce[d]" by a "State or a political subdivision of a State." Construing an award of damages to a tort victim as "establishing, continuing in effect, or enforcing" a boat safety standard is at odds with the ordinary meaning of Congress' words. The duties relied on by tort claimants are general duties under the common law that

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1969 Act in *Cipollone* did not contain any sort of savings provision at all, let alone one that expressly referred to common-law claims.

have evolved over hundreds of years. Although a jury award of damages would represent confirmation of a pre-existing common-law duty – for instance, the duty to act non-negligently – only an inept grammarian could construe an award of damages in a tort suit as "establishing, continuing in effect, or enforcing" a boat safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in effect" or is "enforced."

Fourth, it makes no sense to construe the term "State or a political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. For this reason, it was logical for Congress to include "political subdivisions" in the coverage of Section 4306, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a *federal* jury or judge in a diversity action in which a preemption defense is raised is in any sense a "State or political subdivision thereof." Thus, the Boat Safety Act's express preemption provision cannot reasonably be read to encompass common-law claims.

B. The Act's Savings Clause Expressly Preserves Common-Law Claims.

If any doubt remained as to the inapplicability of the Boat Safety Act's express preemption provision to common-law claims, it would be dispelled by the Act's *anti*-preemption provision – the savings clause – which expressly *preserves* all common-law claims. It states in simple terms: "Compliance

with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g).

On its face, this language is sweeping and unambiguous. "Compliance with standards, regulations, or orders prescribed under this chapter" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to exempt from its scope safety standards that deal with the particular question of design or performance at issue in a given common-law action. Similarly, the phrase "does not relieve a person from liability at common law or under State law" does not on its face admit of qualification. "[L]iability at common law or under State law" is all-inclusive. That phrase cannot fairly be read to mean that the Boat Safety Act provides any basis for exempting any defendant from any common-law liability.

This conclusion is supported by *Geier*, 529 U.S. at 861, which considered a similarly worded preemption provision and savings clause in the Motor Vehicle Safety Act. Like the Boat Safety Act, the preemption provision of the Motor Vehicle Safety Act preempts states from establishing "any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard." 15 U.S.C. § 1392(d). And, like the nearly identical provision in the Boat Safety Act, the savings clause in the Motor Vehicle Safety Act expressly provides that compliance with federal safety standards "does not exempt any person from any liability under common law." *See* 15 U.S.C. § 1397(c).

In interpreting these two provisions, *Geier* noted that, standing alone, the preemption provision of the Motor Vehicle

Safety Act "arguably" might be read broadly to preempt common-law claims. 529 U.S. at 868. But, the Court went on to note, Congress gave no indication that it intended for the preemption provision in the Motor Vehicle Safety Act to be read this broadly. Instead, as in the Boat Safety Act, Congress included a savings clause, expressly communicating its intention to preserve common-law claims. In light of Congress' decision to include this clause, *Geier* found, "a broad reading" of the express preemption provision "cannot be correct." *Id.* at 868. Rather, the inclusion of "[t]he savings clause assumes that there are some significant number of common-law liability cases to save." *Id.* To give "actual meaning" to this clause, the Court found, it is necessary to read the express preemption provision to exclude common-law claims. *Id.* In light of the almost identical wording of the Boat Safety Act's savings clause, the same holding is warranted here.[11]

This interpretation of Section 4311(g) is confirmed by the Boat Safety Act's legislative history, which demonstrates that Congress enacted the savings clause to clarify that the Act does not preempt common-law claims. The savings clause was added to the Act at the urging of Richard Schwartz, the Executive Director of the Boat Owners Association of the United States, who testified that:

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[11] The Boat Safety Act's savings clause's reference to "State law" as well as "common law" does not render *Geier* inapplicable here. This reference merely indicates that some forms of damages liability in some states are imposed via statute rather than common law, and saves those claims as well. *See Cipollone*, 505 U.S. at 518, 537 n.2 (savings clause in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406, providing that "[n]othing in this Act shall relieve any person from liability at common law or under *State statutory law* to any other person," preserves damages claims from preemption).

> we would recommend a savings provision with respect to the consumers' private remedies, which is not touched on by the present Bill. *We would like to see it explicitly clarified that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits.* It should be made clear that this Act does not preempt state or common law.

Merchant Marine Subcommittee of the Senate Committee on Commerce, 92d Cong., 1st Sess., Hearing (March 22, 1971), 88 (emphasis added).

At the same hearing, the Commandant of the Coast Guard, in response to a Senator's question about the inclusion of an express savings clause, also stated that

> [w]e do not believe that compliance with promulgated standards under the Act has the effect of relieving a manufacturer from liability under the usual tort law concerning negligence or warranties. For many years the Coast Guard has required compliance with "standards" by inspected vessels. Courts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with "seaworthiness" under maritime law. Though the analogy is apparent *we would have no objection to an express provision to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability which otherwise could pertain.*

Id. at 66 (emphasis added).

Congress responded by adding the savings clause, and commented that the new provision

> is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of the section is to assure that in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability*. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

Senate Report, 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Thus, at the time of the bill's drafting, Congress was presented with the very question at issue in this case: whether the Boat Safety Act should preempt common-law damages claims. Faced squarely with this issue, Congress did not enact or otherwise provide any "clear and manifest intent" to preempt such laws as is required to find preemption. *See Cipollone*, 505 U.S. at 516. Rather, its response (in the form of the savings clause) demonstrates that Congress intended to preserve common-law claims even in cases where a manufacturer could demonstrate compliance with a minimum federal standard.

III. Petitioner's Claims Are Not Impliedly Preempted.

The lower court agreed that petitioner's claims are not expressly preempted by the Boat Safety Act. Pet. App. 9-10. It held, however, that petitioner's lawsuit is *impliedly* preempted by the Coast Guard's decision not to require

propeller guards on recreational boats. Implied preemption only arises when there is an "actual conflict" between federal and state law – either because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner*, 514 U.S. at 287 (citations omitted). "Impossibility" is not an issue in this case, because it is undisputed that the Coast Guard has not regulated propeller guards and that nothing in federal law would prohibit respondent from installing propeller guards on its boat engines (or from paying compensation to petitioner). The question, then, is whether petitioner's claims somehow "stand as an obstacle" to federal purposes. The answer is no, since this lawsuit is not inconsistent with the goals of either Congress or the Coast Guard.

A. Petitioner's Claims Do Not Conflict With Any Congressional Purposes.

First, petitioner's claims do not in any way "stand as an obstacle" to Congress' purposes. To the contrary, petitioner's claims are entirely consistent with the overriding goal of the Boat Safety Act, which is to promote recreational boating *safety*. When passing the Act, Congress recognized that existing standards for boat safety were inadequate, and that more needed to be done to protect the public from unsafe recreational boats. Common-law actions help to promote this goal by identifying safer products and raising public awareness of the hazards of unguarded propellers. Thus, lawsuits like petitioner's actually *further* Congress' prime interest in this piece of legislation.

Respondent argued below, however, that Congress' main goal in passing the Boat Safety Act was to achieve "uniformity"

in boat safety regulation, and that permitting common-law claims would undermine this goal by subjecting boat manufacturers to conflicting standards of conduct. This was also the crux of the Eleventh Circuit's holding in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (1997), *cert. granted*, 522 U.S. 978, *cert. dismissed*, 523 U.S. 1113 (1998), which found that: (a) the Boat Safety Act preempts the entire field of recreational boat safety regulations; and thus (b) "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." *Id.* at 1505.

These arguments do not withstand analysis. First, as explained *supra* at 23-24, there is no sound basis for concluding that Congress ever intended to preempt the entire field of state positive law with respect to the design and safety features of recreational boats. Rather, because the Boat Safety Act merely permits – rather than requires – the Coast Guard to issue minimum safety standards (*see* 46 U.S.C. § 4302(a)), the most logical reading of the Act is that Congress intended to leave the States free to act in areas where the federal government has not regulated. *See Ray*, 435 U.S. at 171-72. In such areas, the States are free to do as they choose, and there is no federal interest in "uniformity" that could possibly trigger a finding of conflict preemption.[12]

Even assuming, however, that the Boat Safety Act *does* preempt the field of state positive law (and thus bars States from enacting any legislation or regulations except to the extent

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[12] Even in areas where the Coast Guard has regulated, moreover, the agency has the authority to grant broad exemptions from any federal safety standard provided that "recreational vessel safety will not be adversely affected . . .." 46 U.S.C. § 4305.

that they are "identical" to federal safety standards, *see* 46 U.S.C. § 4306), petitioner's lawsuit would still be consistent with federal purposes because Congress expressly *preserved* common-law claims. Once again, *Geier* is illustrative on this point. There, this Court observed that "the pre-emption provision [of the Motor Vehicle Safety Act] itself reflects a desire to subject the industry to a single, uniform set of federal safety standards." 529 U.S. at 871. At the same time, however, the statute's "saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." *Id. Geier* held that, where such a savings clause exists, any finding of preemption is "disfavored" except in instances "where a jury imposed safety standard actually conflicts with a federal safety standard." *Id.*

By similar logic, Congress's interest in regulatory "uniformity" with regard to recreational boating safety cannot form the basis for a finding of implied preemption here. Even if Congress preempted the field of state positive law in this area, the Boat Safety Act's savings clause shows that Congress also intended to permit common-law claims to continue to play their traditional role of protecting and compensating tort victims. That being so, it can hardly be said that petitioner's claims would frustrate Congressional purposes; rather, it is a finding of preemption that would impermissibly frustrate the purposes and policies underlying the Boat Safety Act. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) ("[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to 'stand by both concepts and to tolerate

whatever tension there [is] between them.'") (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

Affording preemptive effect to the Coast Guard's regulatory inaction would also undermine Congress' directive that the Coast Guard act in accordance with the rulemaking procedures of both 46 U.S.C. § 4302 and the Administrative Procedure Act ("APA"). *See* Senate Report at 1340. Congress gave the Coast Guard a limited grant of authority to "prescribe regulations" in the area of recreational boat safety. 46 U.S.C. § 4302. To exercise this authority, however, the Coast Guard must observe the notice-and-comment rulemaking requirements of the APA, which – among other things – "are designed to assure due deliberation." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996).[13] Congress further provided that, if a party is adversely affected by a standard prescribed under the Boat Safety Act, the aggrieved person is entitled to seek judicial review of the standard under the APA. *See* Senate Report at 1340.

[13] Before promulgating a rule, moreover, the agency must consider a number of special factors, including "the need for and the extent to which the regulations will contribute to recreational vessel safety" and "relevant available recreational vessel safety standards" from a variety of sources. *Id.* § 4302(c)(1)-(2). The agency is also obligated formally to consult with its Advisory Council before taking any regulatory action. *Id.* § 4302(c)(4). Even if all these requirements have been observed, the agency is prohibited from "compel[ling] substantial alteration of a recreational vessel or item of associated equipment that is in existence . . . [unless such action is necessary] to avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct." *Id.* § 4302(c)(3).

Thus, Congress gave the Coast Guard the power to flex its preemptive muscle, but obligated it to do so through the actual enactment of regulations in accordance with the well-defined standards and procedures of both Section 4302 and the APA. In the case of propeller guards, however, the agency chose not to undertake any of the actions required to exercise its regulatory authority. Instead, one agency official wrote a letter to the Chairman of the Advisory Council stating that the Coast Guard had decided to "take no regulatory action to require propeller guards." J.A. 80. That this decision was never exposed to public notice and comment or published in the *Federal Register* is reason enough to find that it lacks any substantive preemptive force. *See Chrysler v. Corp. v. Brown*, 441 U.S. 281, 313 (1979) (holding that substantive agency rule "cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in [the APA]"); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (same).

This Court has recognized that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by . . . agencies must be rooted in a grant of power by the Congress *and subject to limitations which that body imposes*." *Chrysler*, 441 U.S. at 302 (emphasis added). In this case, Congress limited the Coast Guard's authority with respect to recreational boat design to the promulgation of *actual rules* under Section 4302. Thus, if the Coast Guard Letter had said that propeller guards should be *required* on all boats, but took no regulatory action to mandate that result, then Mercury Marine could not be prosecuted or fined by the agency for failing to install propeller guards. *See id.*; *Morton*, 415 U.S. at 236. Yet, if Mercury Marine has its way here, tort victims will be stripped of their right to seek compensation for their injuries even though the agency has not

taken *any* formal action regarding propeller guards, let alone prescribed the sort of standard required by Section 4302. Affording preemptive effect to the agency's letter, then, would create a one-way rule that would work solely in respondent's favor – surely a result that Congress neither envisioned nor permitted. Thus, if anything, finding preemption here would actually *frustrate* Congressional purposes.

B. Petitioner's Claims Do Not Conflict With The Coast Guard's Purposes.

Petitioner's claims also do not conflict with the Coast Guard's purposes. We begin with the key point: *there is no federal regulation regarding propeller guards*. Respondent does not dispute that the Coast Guard has the authority, if it chooses, to require (or even ban) propeller guards. Yet the Coast Guard has taken no such action with regard to propeller guards; to the contrary, after studying the issue, the agency expressly declined to take *any* regulatory action in this area. Having done so, however, the Coast Guard remains free to promulgate a rule addressing propeller guards, if appropriate justifications exist. Thus, the agency is at liberty to take whatever actions it deems appropriate in this area – so long as those actions are consistent with the rulemaking obligations imposed on it by Congress.[14]

Nor can it be said that petitioner's lawsuit would frustrate an implicit intent on the agency's part to preempt common-law claims involving propeller guards. As explained above, the Coast Guard's investigation into a possible propeller-guard

[14] In fact, the agency has recently proposed a rule that, if enacted, would require owners of rental houseboats to install either a propeller guard or a combination of various other "propeller injury avoidance measures." J.A. 141.

requirement was prompted in part by the numerous lawsuits filed by propeller-strike victims. J.A. 17. In fact, a majority of the witnesses that appeared before the Subcommittee had served as expert witnesses in propeller-guard litigation, and several pages of the Subcommittee Report are exclusively devoted to this topic. J.A. 15-16. Yet, despite the centrality of propeller-guard litigation in the Subcommittee's investigation, neither the Subcommittee Report nor the Coast Guard Letter contains any hint that the agency intended to preempt common-law tort claims like petitioner's. Indeed, there is not a single word in the entire agency record that the Coast Guard ever even considered that possibility. Given this silence, and the absence of any federal regulation relating to propeller guards, it would be "perverse" to conclude that the Coast Guard, without saying so, implicitly wiped out all common-law claims, leaving individuals like Rex Sprietsma with no remedy at all. *Medtronic*, 518 U.S. at 487 (plurality); *see also Silkwood*, 464 U.S. at 251 ("[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

Mercury Marine has nonetheless contended that preemption should be inferred here because petitioner's claims would conflict with the Coast Guard's alleged conclusion that propeller guards actually *decrease* boat safety. The Coast Guard, however, has never reached any such conclusion. In its unpublished letter, the agency merely stated that:

> The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable

> propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

J.A. 80. Thus, the agency's decision was based, *not* on a finding that propeller guards are dangerous, but rather on its concerns that (1) the existing data could not meet the "stringent" rulemaking standards of the Act (which require, *inter alia*, a finding that any rule compelling the substantial alteration of existing boats is necessary to avoid a "substantial risk of personal injury to the public . . . ," 46 U.S.C. § 4302(c)(3)); and (2) there was no technically feasible solution to the problem of unguarded boat propellers "in all modes of boat operation." J.A. 80. Neither of these conclusions would be undermined in the least by a jury verdict holding a manufacturer liable for failing to include a *particular* propeller guard on a *particular* boat engine.

In response, Mercury Marine has pointed to statements in the Subcommittee Report that some propeller guards might cause injuries when used on some boats, and attempted to parlay this into a purported conclusion by the agency that propeller guards are inherently dangerous. This approach, however, is based on a fundamentally flawed premise: that the Subcommittee is the functional equivalent of the Coast Guard for purposes of agency decision-making. In reality, however, the five-member Subcommittee (which is itself merely a subset of the Advisory Council) possessed no regulatory authority and included four non-agency officials, including members of the public and an industry representative. Congress has made clear, moreover, that an Advisory Council member is not "an officer or employee of the United States Government for any purpose." 46 U.S.C. § 13110(d). That being so, there is no basis for

asserting that the Subcommittee's conclusions are those of the Coast Guard.

As a factual matter, moreover, any such assertion is inconsistent with the Coast Guard's own actions. First, the Coast Guard Letter neither repeated nor endorsed any of the Subcommittee's statements regarding the purported dangers of propeller guards. This omission, standing alone, would be telling enough, but the Coast Guard Letter goes on to state that the agency intended to continue to gather information regarding the "*development and testing of new propeller guarding devices*" (J.A. 81) (emphasis added) and to publish "a series of articles . . . aimed at avoiding boat/propeller strike accidents. *Topics could include*, for example, . . . *available propeller guards* . . .." J.A. 83 (emphasis added). Thus, not only did the agency omit any mention of the alleged hazards of propeller guards, but it chose to emphasize that such devices could play a role in helping to avoid "propeller strike accidents" in the future. In the face of these statements, there is no basis for concluding that the agency found propeller guards to be contrary to the interests of boat safety – and thereby implicitly preempted common-law tort claims like petitioner's. *See Kelly v. State of Washington*, 302 U.S. 1, 10 (1937) (even in the maritime context, state law may be superceded by federal action "only where the repugnance is so 'direct and positive' that the two [laws] 'cannot be reconciled or consistently stand together'") (citations omitted).

C. This Court's Teachings Confirm That Petitioner's Claims Are Not Impliedly Preempted.

The lower court nonetheless found that petitioner's claims are impliedly preempted on the theory that the Coast Guard's "decision to forego regulation in a given area [implies] an

authoritative federal determination that the area is best left *un*regulated." Pet. App. 13 (quoting *Arkansas Electric Co-op. v. Arkansas Pub. Serv. Com'n*, 461 U.S. 375, 384 (1983)). This holding, however, misapplies this Court's teachings regarding the preemptive effect of regulatory inaction. It is true that, where the federal government has fully occupied a particular regulated field, this Court has occasionally found federal preemption in the absence of a specific federal standard governing the product or transaction at issue.[15] These holdings have no bearing here, however, because the Boat Safety Act does not preempt the field of state positive law with respect to recreational boat design (*see supra* at 23-24) and, even if it does, common-law claims are expressly *excluded* from any preempted field.

In addition, in *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum*, 485 U.S. 496 (1988), this Court cautioned that *Arkansas Electric* should not be interpreted to mean that "deliberate federal inaction could always imply preemption."

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[15] *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (holding state positive law extending patent-like protection to boat manufacturing process that was unprotected by federal patent laws preempted because it "enters the field of regulation which the patent laws have reserved to Congress"); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 425 (1986) (holding state positive law imposing requirements on gas purchases preempted despite lack of federal regulation in this area because Congress "intended federal occupation of the regulated field"); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 613 (1926) (holding state positive law preempted because it purported to impose rule in regulatory field already occupied by federal statute, even though the agency "has not seen fit to exercise its authority to the full extent conferred"). In addition, *Arkansas Electric* itself ultimately held that "nothing in the language, history, or policy of the Federal Power Act suggests . . . a conclusion" that a decision not to issue federal regulations should preempt state regulation. 461 U.S. at 384.

Id. at 503. This proposition "cannot be," for "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Id.* Thus, the Court found, where there is no "extant" action that "can create an inference of preemption in an unregulated segment of an otherwise regulated field, *preemption, if it is intended, must be explicitly stated*." *Id.* (emphasis added). This test is plainly not met here, given that the agency has never taken any regulatory action with respect to propeller guards and has remained completely silent on the subject of preemption.

Contrary to the lower court's holding (*see* Pet. App. 13-15), *Ray v. Atlantic Richfield* Co., 435 U.S. 151 (1978), does not suggest a different result. *Ray* considered whether various aspects of a Washington state law governing oil tankers in Puget Sound (the "Tanker Law") violated the Ports and Waterways Safety Act of 1972 (the "PWSA") and various associated Coast Guard regulations. *Ray* held that specific design requirements imposed by the Tanker Law were preempted by Title II of the PWSA, which occupied the entire field of state law in this area. *Id.* at 168. This holding has no bearing in this case because the Boat Safety Act (unlike Title II) does not preempt the field of state positive law and, even if it did, this case involves *common-law* claims that, by virtue of the Act's savings clause, clearly do not fall within any field occupied by the Boat Safety Act.[16]

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[16] As the basis for its contrary conclusion, the lower court relied on *Ray*'s subsequent holding that Title I of the PWSA, which governs "vessel traffic services and systems," preempted a provision of the Tanker Law banning oil tankers in excess of 125,000 dead weight tons from entering Puget Sound. *Id.* at 174-78. *See* Pet. App. 14-15. Because Title I "merely authorizes and does not require" the Coast Guard to issue any regulations in this area (*id.* at 171), and thus – like the Boat Safety Act – does not preempt

Geier's implied preemption holding is equally inapplicable to this case. In opposing review by this Court, Mercury Marine mischaracterized *Geier* as holding that "allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to install an airbag requirement." Opposition Br. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claimed that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id.* (emphasis in original).

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no* regulatory action at all), *Geier* involved a highly complex federal safety standard that did, in fact, regulate the use of airbags. In *Geier*, this Court confronted the 1984 version of a federal motor vehicle safety standard promulgated by the National Highway Traffic and Motor Vehicle Safety Administration ("NHTSA") – Standard 208 – that required auto manufacturers gradually to "phase-in" the use of passive restraint devices in passenger automobiles. Unlike the typical minimum safety standards promulgated by NHTSA, Standard 208 "deliberately sought variety . . . by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint

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the field of state law, the question was whether the Secretary had taken sufficient action to preempt this aspect of the Tanker Law. *Ray* held that the State's size limitation was preempted because – unlike here – the Coast Guard had promulgated a vessel-traffic control system for Puget Sound that "contain[ed] only a narrow limitation on the operation of supertankers." *Id.* at 178. This holding only serves to underscore the absence of preemption here, given that Coast Guard has never regulated propeller guards in any respect.

mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." 529 U.S. at 878. Against this backdrop, *Geier* held that a common-law damages action holding a manufacturer liable for its failure to install an airbag would conflict with NHTSA's goal of encouraging a mixture of passive restraint devices. *Id.* at 880.[17]

The facts here could not be farther from those in *Geier*. Unlike the complex set of regulatory obligations imposed by Standard 208, which affirmatively encouraged a mixture of passive restraint devices, *there is no federal regulation whatsoever governing propeller guards.* Instead, following an internal investigation that never reached the rulemaking stage, the Coast Guard decided not to attempt to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. J.A. 80. To date, there is no federal safety standard governing (or even addressing) the use of propeller guards. Thus, unlike in *Geier*, there is no federal regulatory framework with which petitioner's common-law claims could possibly conflict.

In this sense, this case is markedly similar to *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted in the absence of an applicable federal safety standard. In 1974, the agency had promulgated a rule – Standard 121 – that required that all truck manufacturers install antilock brakes.

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[17] In so ruling, *Geier* gave "special weight" to an *amicus curiae* brief filed by the United States, in which the agency strenuously argued that no-airbag claims would conflict with and substantially undermine NHTSA's regulatory goals. *See id.* at 886.

This requirement was invalidated by the Ninth Circuit in *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (1978), which held that, although the braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. In response, the agency added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." *Freightliner*, 514 U.S. at 285.

In *Freightliner*, the truck manufacturers argued that federal law preempted common-law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no express or implied preemption because there was no federal standard in place regarding antilock brakes in trucks. *See id.* at 289. In so holding, *Freightliner* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation," especially where "there is no evidence that [the federal agency] decided that [the product] would be free from all state regulation." *Id.* at 286. *See also id.* at 289-90 (emphasizing that "Standard 121 currently has nothing to say concerning [antilock brakes] one way or another, and [the agency] has not ordered truck manufacturers to refrain from using . . . [the] devices"). Similarly here, there is no regulation governing propeller guards and no basis for concluding that the agency intended to preempt common-law claims relating to those devices.

The lower court distinguished *Freightliner* on the ground that, "[i]n contrast to *Freightliner*, where the lack of federal regulation was not the result of an affirmative decision not to regulate, here, the Coast Guard did make an affirmative decision to refrain from promulgating a propeller guard

requirement." Pet. App. 11-12. This, however, is a distinction without a difference. Here, as in *Freightliner*, the Coast Guard never ordered boat engine manufacturers to refrain from installing propeller guards – to the contrary, the Coast Guard Letter appears to encourage further testing and use of such devices. J.A. 81, 83. And there is no evidence that the Coast Guard decided that propeller guards "should be free from all state regulation." *Id.* at 286. Rather, as in *Freightliner*, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Freightliner*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121 eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to commence rulemaking was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Freightliner* makes clear that federal preemption does not exist under these circumstances.

* * *

In sum, petitioner's claims are neither expressly nor impliedly preempted by federal law. Any contrary holding would not only unlawfully deprive petitioner and other victims of unguarded boat propellers of their day in court, but it would seriously encroach on "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). This Court has emphasized that the federal government's power to impose its will on the States under the Supremacy Clause "is an extraordinary power in a federalist system," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), and that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Surely an

equivalent degree of certainty should be required when determining whether a federal *agency* intended to override state law.

The type of preemption found by the lower court here, however, is based on federal agency *inaction* with respect to a particular device and agency *silence* on the subject of preemption – in the face of an express statutory provision prohibiting such preemption. Under this radical approach, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the particular reason for federal inaction. Such a ruling could wipe out common-law tort remedies in myriad areas where the federal government has considered, but ultimately decided not to promulgate, a minimum federal safety standard governing a particular product.

Further, in a case where – as here – the federal government have not undertaken any formal rulemaking regarding the product at issue, the lower court's approach would result in the eradication of common-law claims without any meaningful notice to the States or opportunity for them to comment on the propriety of such a restriction – a result wholly at odds with "the federal/state balance embodied in [this Court's] Supremacy Clause jurisprudence." *Hillsborough County v. Auto. Med. Labs*, 471 U.S. 707, 717 (1985). It is also at odds with the Executive Branch's own requirement that the States must be afforded the opportunity to participate in any rulemaking that involves the possible preemption of state law. *See* Exec. Order No. 12612, § 4(e), 3 C.F.R. § 252, 255 (1988); Exec. Order No. 13132, § 4(e), 64 Fed. Reg. 43,255, 43,257 (1999) (discussed in *Geier*, 529 U.S. at 909 n.24 (Stevens, J., dissenting)). In recognition of the role of the States as independent sovereigns within our federalist system, this Court should make clear that,

at the least, the States must be given notice and an opportunity to be heard in the rulemaking process before they are stripped of their power to protect and compensate their citizens through the common law.

CONCLUSION

The lower court's decision finding preemption of petitioner's claims should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

The relevant sections of the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311, provide as follows:

46 U.S.C. § 4301(a). Application:

(a) This chapter [46 USCS §§ 4301 et seq.] applies to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States (including the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988 [43 USCS § 1331 note]) and, for a vessel owned in the United States, on the high seas.

46 U.S.C. § 4302(a)-(c). Regulations:

(a) The Secretary may prescribe regulations –

(1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard –

(A) meeting the need for recreational vessel safety; and

(B) being stated, insofar as practicable, in terms of performance;

(2) requiring the installation, carrying, or use of associated equipment (including fuel systems, ventilation systems, electrical systems, sound-producing devices, firefighting equipment, lifesaving devices, signaling devices, ground

tackle, life- and grab-rails, and navigational equipment) on recreational vessels and classes of recreational vessels subject to this chapter [46 USCS §§ 4301 et seq.], and prohibiting the installation, carrying, or use of associated equipment that does not conform with safety standards established under this section; and

(3) requiring or permitting the display of seals, labels, plates, insignia, or other devices for certifying or evidencing compliance with safety regulations and standards of the United States Government for recreational vessels and associated equipment.

(b) Each regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published, unless the Secretary finds that there exists a recreational vessel safety hazard so critical as to require an earlier effective date. However, this period may not be more than 24 months for cases involving, in the discretion of the Secretary, major product design, retooling, or major changes in the manufacturing process.

(c) In prescribing regulations under this section, the Secretary shall, among other things –

(1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;

(2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;

(3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence,

or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and

(4) consult with the National Boating Safety Advisory Council established under section 13110 of this title [46 USCS § 13110] about the considerations referred to in clauses (1)-(3) of this subsection.

46 U.S.C. § 4305. Exemptions:

If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter [46 USCS §§ 4301 et seq.] or a regulation prescribed under this chapter [46 USCS §§ 4301 et seq.].

46 U.S.C. § 4306. Federal Preemption:

Unless permitted by the Secretary under section 4305 of this title [46 USCS § 4305], a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title [46 USCS § 4302].

46 U.S.C. § 4311. Penalties and Injunctions:

(a) A person willfully operating a recreational vessel in violation of this chapter [46 USCS §§ 4301 et seq.] or a regulation prescribed under this chapter [46 USCS §§ 4301 et seq.] shall be fined not more than $5,000, imprisoned for not more than one year, or both.

(b) A person violating section 4307(a)(1) of this title [46 USCS § 4307(a)(1)] is liable to the United States Government for a civil penalty of not more than $2,000, except that the maximum civil penalty may be not more than $100,000 for a related series of violations. When a corporation violates section 4307(a)(1) [46 USCS § 4307(a)(1)], any director, officer, or executive employee of the corporation who knowingly and willfully ordered, or knowingly and willfully authorized, a violation is individually liable to the Government for the penalty, in addition to the corporation. However, the director, officer, or executive employee is not liable individually under this subsection if the director, officer, or executive employee can demonstrate by a preponderance of the evidence that –

(1) the order or authorization was issued on the basis of a decision, in exercising reasonable and prudent judgment, that the defect or the nonconformity with standards and regulations constituting the violation would not cause or constitute a substantial risk of personal injury to the public; and

(2) at the time of the order or authorization, the director, officer, or executive employee advised the Secretary in writing of acting under this clause and clause (1) of this subsection.

(c) A person violating any other provision of this chapter [46 USCS §§ 4301 et seq.] or other regulation prescribed under this chapter [46 USCS §§ 4301 et seq.] is liable to the Government for a civil penalty of not more than $1,000. If the violation involves the operation of a vessel, the vessel also is liable in rem for the penalty.

(d) When a civil penalty of not more than $200 has been assessed under this chapter [46 USCS §§ 4301 et seq.], the Secretary may refer the matter of collection of the penalty directly to the United States magistrate of the jurisdiction in which the person liable may be found for collection procedures under supervision of the district court and under an order issued by the court delegating this authority under section 636(b) of title 28 [28 USCS § 636(b)].

(e) The district courts of the United States have jurisdiction to restrain a violation of this chapter [46 USCS §§ 4301 et seq.], or to restrain the sale, offer for sale, introduction or delivery for introduction into interstate commerce, or importation into the United States, of a recreational vessel or associated equipment that the court decides does not conform to safety standards of the Government. A civil action under this subsection shall be brought by filing a petition by the Attorney General for the Government. When practicable, the Secretary shall give notice to a person against whom an action for injunctive relief is contemplated and provide the person with an opportunity to present views and, except for a knowing and willful violation, shall provide the person with a reasonable opportunity to achieve compliance. The failure to give notice and provide the opportunity does not preclude the granting of appropriate relief by the district court.

(f) A person is not subject to a penalty under this chapter [46 USCS §§ 4301 et seq.] if the person –

(1) establishes that the person did not have reason to know, in exercising reasonable care, that a recreational vessel or associated equipment does not conform with the applicable safety standards of the Government or that the person, was not advised by the Secretary or the manufacturer of that vessel, equipment or component that the vessel, equipment or component contains a defect which creates a substantial risk of personal injury to the public; or

(2) holds a certificate issued by the manufacturer of that recreational vessel or associated equipment to the effect that the recreational vessel or associated equipment conforms to all applicable recreational vessel safety standards of the Government, unless the person knows or reasonably should have known that the recreational vessel or associated equipment does not so conform.

(g) Compliance with this chapter [46 USCS §§ 4301 et seq.] or standards, regulations, or orders prescribed under this chapter [46 USCS §§ 4301 et seq.] does not relieve a person from liability at common law or under State law.

Supreme Court, U.S.
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No. 01-706

In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEAN SPRIETSMA, PETITIONER,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION, RESPONDENT.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

The complaint alleges that the boating accident in this case occurred on a navigable interstate waterway. Accordingly, the case is governed by federal maritime law and not the common law of any state. The questions presented are:

1. Whether federal common law, applied by state and federal courts adjudicating maritime claims, should be expanded to impose a duty to install "propeller guards," where Congress has committed that issue to a federal administrative agency and the agency has refused to require installation of propeller guards.

2. Alternatively, if state common law is applicable, whether a state law propeller guard claim arising from an accident on navigable waters of the United States is preempted by the Federal Boat Safety Act.

RULES 29.6 AND 14.1 STATEMENT

Respondent is Mercury Marine, an unincorporated division of Brunswick Corporation. Brunswick Corporation has no parent company, and no publicly held company owns 10% or more of Brunswick's stock.

Petitioner is Rex R. Sprietsma, administrator of the estate of Jeanne Sprietsma.

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Lewis v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001) 20

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James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) 25, 38

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

A. The Federal Boat Safety Act

Congress enacted the Federal Boat Safety Act ("BSA"), 46 U.S.C. §§ 4301-4311, to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve these goals by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.* The BSA represents "a single comprehensive piece of legislation" that "preempts the field on boating standards or regulations." H.R. Rep. No. 92-324, at 9-11 (1971) ("H.R. Rep.").

The Act empowers the Coast Guard to prescribe comprehensive federal design standards for boats and associated equipment, including motors. It directs the Coast Guard to prescribe regulations:

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard—
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance * * * .

46 U.S.C. § 4302(a). The Act further provides that the Coast Guard may "not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence." Standards requiring even insubstantial alterations of boats must be necessary "to avoid a substantial risk of personal injury to the public" and "appropriate in relation to the degree of hazard that the compliance will correct." *Id.* § 4302(c)(3). "The term 'substantial alteration' is intended to encompass economic as well as physical considerations." Congress intended "that great caution be exercised in applying standards to existing boats because of the great burden this can create on both

manufacturers and the boating public." S. Rep. No. 92-248, at 18-19 (1971) ("S. Rep."); see *id.* at 18 ("no standard may compel substantial alteration of an existing boat").

In considering whether to adopt manufacturing standards, the Coast Guard must consider "the need for and the extent to which the regulations will contribute to recreational vessel safety," "relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation," and "whether any proposed regulation or standard is reasonable and appropriate for the particular type of boat or associated equipment for which it is prescribed." 46 U.S.C. § 4302(c)(1)-(2); Pub. L. No. 92-75, § 6(3), 85 Stat. at 216. It must also "consult with" the National Boating Safety Advisory Council ("NBSAC" or "Council") in deciding whether to regulate. 46 U.S.C. §§ 4302(c)(4), 13110. The Council's 21 members, all appointed by the Secretary, must have expertise in recreational boating safety and represent three different constituencies: (a) seven officials responsible for state safety programs; (b) seven representatives of manufacturers; and (c) seven representatives of boating organizations and the general public. *Id.* § 13110(a), (b)(1). "Additional individuals" from these sources "may be appointed to panels of the Council to assist the Council in performing its duties." *Id.* § 13110(b)(2).

Although Congress was of the view that "[t]he overriding consideration in the issuance of standards [is] safety," it recognized that establishing reasonable standards "necessarily also involves a consideration of technical feasibility and cost." S. Rep. at 17. Congress expected the Coast Guard to conduct a cost-benefit analysis of all proposed standards, whereby it would "weigh the degree of a hazard which has been perceived" and "require compliance with a standard to obviate the hazard when compliance is economically and physically reasonable in relation to the hazard involved." *Id.* at 18. "It was precisely to take advantage of the expertise and flexibility

available in the administrative process in these regards, and the possibility for continuous review and updating of standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.* at 17.

B. Preemption Under The Federal Boat Safety Act

The BSA mandates "national construction and performance standards for boats and associated equipment." S. Rep. at 15. Congress was particularly concerned that such requirements be nationally uniform: "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." *Id.* at 14; see H.R. Rep. at 29. Prior law did not preempt state design requirements, and Congress believed that "[i]t [was] time that recreational boats be built in accordance with standards prescribed by one Federal agency." H.R. Rep. at 2. As Representative Monagan stated: "A proliferation of dissimilar standards would give the manufacturer * * * an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 101 (1971) ("S. Hearing").[1]

---

[1] Accord H.R. Rep. at 16 ("it is intended that the uniformity of standards expected under this Act shall not be upset by excessive special requirements by individual states"; states may regulate only if "required to meet uniquely hazardous conditions or circumstances within that state" and if regulation is approved by the Secretary); *id.* at 29; *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before a Subcomm. of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 37 (1970) ("H. Hearings") (the BSA "precludes the establishment or enforcement of state boat safety standards and equipment requirements which are not identical to Federal standards * * * . The reason for such a preemption is to insure that manufacturers building for the entire domestic trade will not find themselves in the unfortunate position of having to comply with varying boat safety standards in different places"); *id.* at 61 ("it is quite important both for the convenience

Congress also recognized that maritime safety traditionally has been an area where federal regulation predominates. As the Senate Report explains: "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20.

These considerations led Congress to draft the BSA's preemption clause in broad and inclusive terms:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or

---

of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country"); *id.* at 54 ("A single set of standards is * * * necessary"); *id.* at 59 (federal standards "should preempt State and local jurisdictions as their laws might affect the manufacturer"); *id.* at 66 ("The need for uniformity, particularly with respect to standards for boats and associated equipment, now requires preemption by the Federal Government"); *id.* at 66, 67 (the "lack of uniformity" is "both a real and potential problem" that is "costly to manufacturer and boatman alike" and "now requires preemption by the Federal Government"); *id.* at 84 ("the State must not be delegated any authority in carrying out any of those provisions applying to boat construction and design"); *id.* at 67, 86; S. Hearing at 45 ("Presently, the Federal Government cannot preempt the boating standards field. It is even possible for States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply with all of them, and, of course, for the boatman to comply with the law when he moves between jurisdictions. This legislation will provide a solution to this problem"); *id.* at 98 ("no State, without the consent of the Secretary of the Department of Transportation, may be more restrictive in equipment requirements, thereby assuring uniformity among the several Government jurisdictions"); *id.* at 54, 68, 70.

> circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. By mandating that any state design standard be "identical" to an on-point Coast Guard regulation, the preemption clause "preempts the field on boating standards or regulations" and "assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." H.R. Rep. at 11; S. Rep. at 20. However, § 4306 "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." *Ibid.*

C. The Federal Boat Safety Act's Savings Provision

Late in the course of Congress's consideration of the BSA, the Senate Commerce Committee added a "Savings Provision" to the bill (see S. Rep. at 31): "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Congress made no distinction between liability under "common law" and "State law."

Section 4311(g) was added "to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability *which otherwise could pertain*" —*i.e.*, "liability under the usual tort law concerning negligence or warranties." S. Hearing at 66 (statement of Coast Guard Commandant Admiral Bender) (emphasis added). In the same statement in which he remarked that the Coast Guard "would have no objection" to clarifying the Act in this regard, Admiral Bender explained that "[t]he Federal Government cannot now preempt the boating standards field" and that "it is possible for States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply with the law." "[T]his legislation will correct these problems." *Id.* at 50.

The savings clause did not preserve common law claims that impose *design* requirements on manufacturers, which are subject to preemption. Rather, as the Senate Report explains, the savings clause avoids an absolute defense in the "usual" tort case where state law still plays a role (S. Rep. at 32):

> The purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.

The only recorded discussion of § 4311(g) in the House was a brief colloquy in which Representative Grover described it as a "technical amendmen[t] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. 28036 (1971).

D. The Coast Guard's Considered Determination That Propeller Guards Should Not Be Required

The Coast Guard has promulgated a host of federal boat and motor design standards. See 33 C.F.R. Chap. I, Subchap. S. In particular, it has adopted numerous "Equipment Requirements," including design standards for boat motors, electrical and fuel systems, distress signals, and ventilation systems. See *id.* Parts 175 (Subparts B-D), 183 (Subparts D-L). Several Coast Guard manufacturing standards are specifically designed to mitigate the risks of passengers falling out of boats or being struck by propellers, as happened here. For example, the Coast Guard requires that boats with outboard motors either be equipped with a device to prevent them from starting in gear or display a warning. 33 C.F.R. §§ 183.710, 183.715. Similarly, it has promulgated an extensive body of rules governing the "maximum weight" and "persons capacity" of boats, and another set of regulations requiring that all boats pass elaborate "stability tests." *Id.* Part 183, Subparts B-C, G-H.

The Coast Guard exhaustively regulates the "safe powering" and "maximum horsepower capacity" of boats, the "placement"

of outboard motors, and the "quick turn" capability of boats equipped with such motors as well. *Id.* § 183.53. These latter requirements—which mandate that boats must be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle" at "maximum throttle" (*ibid.*)—are particularly relevant here, because the NBSAC's Propeller Guard Subcommittee, discussed below, found that boats with propeller guards could not pass this test. J.A. 31-32.

1. The Coast Guard's call for fact finding

In 1988, the Coast Guard received rulemaking petitions requesting that it require manufacturers to install propeller guards on boat motors. As required by 46 U.S.C. § 4302(c)(4), the Coast Guard consulted with the NBSAC and directed it to:

- "Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water," and
- "Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public."

NBSAC, *Report of the Propeller Guard Subcommittee* (Nov. 7, 1989) ("Report"), Appendix A (J.A. 43).

Pursuant to 46 U.S.C. § 13110(b)(3), the NBSAC in turn appointed a subcommittee to "assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers" and the "[f]easibility of some form of mechanical guard or other action to prevent such contact." J.A. 12. The NBSAC further charged the Subcommittee to consider "the incidence of [propeller-related] accidents," "the possible solutions and their advantages/disadvantages," "the direct costs and indirect costs (fuel economy, maintenance, etc.) of mechanical solutions," whether

"the risks [can] be addressed adequately by education," "the potential for propellers equipped with each of several propeller guard designs to cause injury," whether the Coast Guard should "move towards a federal requirement for some form of propeller guard" and, if so, whether the requirement should be imposed on "only new boats and motors" or "all boats." J.A. 43-44.

The Subcommittee comprised representatives of every interested constituency—state boat safety officials, industry representatives, members of recreational boating groups, and members of the general public. J.A. 71. Throughout its study, it invited oral and written participation from others by publishing notices of its proceedings in the Federal Register.[2]

Over an 18-month period, the Subcommittee heard from designers of propeller guards, accident victims, attorneys, engineers, naval architects, academics, industry representatives, and medical doctors. It conducted a "comprehensive" review of the "documentation, materials and information" about propeller-related injuries, including videos, articles, patents, test data, and statistics pertaining to the causes of boating accidents. It held public meetings across the country. And it conducted its own on-water tests of propeller guards. J.A. 12-17, 49-60.

2. The Subcommittee's propeller guard study

Initially, the Subcommittee reviewed the risk of fatality from power-boating compared to that of other activities, including other types of boating, and found the risk to be small. J.A. 24. It further found that, of the boating injuries caused by propeller strikes, many involve "[p]assengers moving about or improperly seated." J.A. 25. "Operator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors

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[2] See, *e.g.*, 53 Fed. Reg. 33210 (Aug. 30, 1988); *id.* at 43070 (Oct. 25, 1988); *id.* at 43069; 54 Fed. Reg. 15068 (Apr. 14, 1989); *id.* at 15066; *id.* at 42138 (Oct. 13, 1989).

in reported 'propeller strikes,'" the Subcommittee noted, and "approximately 80% of all accidents occur when a boat is operating at speeds in excess of 10 miles per hour, i.e. normal operating or planing speeds." *Ibid.* The latter finding was important because "a skull impact at 10 mph or more in the water would be generally fatal"—"[e]ven with an idealized cushioning material, not currently known to exist." J.A. 33.

The Subcommittee then proceeded to examine each of the "three basic configurations of 'propeller guards'": (1) ring-type guards, (2) screen- or cage-type guards, and (3) nozzle-type guards. J.A. 27-28. Observing that any propeller guard requirement "would necessarily be predicated on the feasibility of guards and establish prima facie manufacturer liability in having failed to provide them," it stated that "[f]easibility" was an "important questio[n] before the Subcommittee." J.A. 18.

Ring-type guards consist of a circular band surrounding the motor's propeller to prevent contact from the propeller's side. J.A. 27. However, the Subcommittee found that "the ring-type guard creates severe steering and trim effects which cause serious safety and control problems." J.A. 31. In on-water tests, for example, "the boat could not be brought out of a turn at high speed unless power was quickly reduced. In the hands of an inexperienced or negligent operator, a serious accident could result." *Ibid.* Moreover, ring-type guards create "a new hazard"—"an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller." J.A. 36.

Cage- or mask-type guards consist of "a screen surrounding the propeller like a fan cage or catcher's mask, constructed of wire mesh, bars or wires." J.A. 28. The Subcommittee found, however, that such guards are only feasible for use on slow-moving "rescue boats" or "amusement park bumper boats, which operate at very slow speeds (approximately 2 miles an hour or less) where problems of drag, engine efficiency, structural integrity and boat handling are negligible," and where "a blow to a person in the water" has "minimal effects." "No

evidence indicated that this solution had any validity for normal use of pleasure boats at normal planing speeds." J.A. 30.

Both ring- and mask-type guards "affect boat operation adversely," "result in drag increasing proportionally to the square of speed, resulting in substantial power and speed loss," and "substitute the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to an ascending serious risk of fatality." J.A. 36, 37.

Nozzle-type guards surround the propeller with "a tunnel or tube" and are designed "to increase its efficiency by producing greater power at low speeds, such as for tug boats and large ships." But "[n]o example of any nozzle device suitable for recreational boat use at normal operating speeds was brought to the attention of the Subcommittee." J.A. 28, 30.

3. The Subcommittee's conclusions

Based on the data it collected, the Subcommittee conducted a cost-benefit analysis of propeller guards, explaining that any "technologically feasible safety featur[e]" must "minimize the consequences of inexperienced or negligent operation, without at the same time (a) creating some other hazard, (b) materially interfering with normal operations, or (c) being at economic costs disproportionate to the particular risk." J.A. 35. The Subcommittee rejected "assert[ions] that propeller guard technology and/or availability meets the foregoing criteria and that guards should be mandated." J.A. 35-36. Rather, it found "that propeller guards could create other safety concerns, including: (1) adversely affecting boat operations at speeds greater than 10 miles per hour; (2) increasing the chance of blunt force contact to a person in the water; and (3) creating a new hazard in that an arm or leg could be caught between the guard and the propeller blades." Pet. App. 3. Propeller guards would also require manufacturers greatly to increase their engine horsepower and degrade fuel economy. J.A. 32, 37.

The Subcommittee's lengthy report thus concluded that "propeller guarding at best could have only a negligible impact on improving boating safety," and that "[o]perators of a 'guard-equipped' boat can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage." J.A. 36, 39. As stated in the Report's Conclusions:

> The development and use of devices such as "propeller guards" can * * * be counter-productive and can create new hazards of equal or greater consequence. * * * [T]here are no indications that there is a generic or universal solution currently available or foreseeable in the future. The boating public must not be misled into thinking there is a "safe" device which would eliminate or significantly reduce such injuries or fatalities.

J.A. 39-40. The Subcommittee added that any propeller guard must have "hydrodynamic compatibility with the hull on which the motor is used." Since there are hundreds of engines and "thousands of hull designs, the possible hull/propulsion unit combinations are extremely high"—combinations that are not under the control of manufacturers because motors are not built for specific boats but for *all* boats with appropriate horsepower ratings. J.A. 38. And even if propeller guards were feasible and safe, the Subcommittee concluded that "[t]o retrofit the some 10 to 15,000,000 existing boats would * * * require a vast number of guard models at prohibitive cost." *Ibid.*

The Subcommittee made several policy recommendations to the NBSAC. It first recommended that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 40. Instead, the Coast Guard should (among other things) implement "educational and awareness campaigns" regarding "potential hazards associated with careless or negligent boat operation" and "review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore

and aft view of the boat operator." J.A. 40-41. There were no "dissenting statements." J.A. 13.

4. The Coast Guard's adoption of the Subcommittee's recommendations

The NBSAC and the Coast Guard *unanimously* adopted the Subcommittee's recommendations. J.A. 78; J.A. 80 ("All of the report's recommendations are accepted" and "will be implemented"). In keeping with the Council's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard expressly declared that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." J.A. 80 (emphasis added). In addition to the accident data set forth by the Subcommittee, the Coast Guard cited "the many questions about whether a universally acceptable propeller guard is available or technically feasible" and the fact that "retrofitting millions of boats would certainly be a major economic consideration" as grounds for rejecting a propeller guard requirement. *Ibid.* See also J.A. 83 (noting "the vast array of boat configurations").

The Coast Guard also announced that it would take the alternative steps recommended by the Subcommittee to prevent propeller accidents. J.A. 82. And it noted that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices." J.A. 81. However, despite several instances in which the Coast Guard has invited the public to submit information regarding the feasibility of fitting *other* types of boats with propeller guards (*e.g.*, houseboats), it has never altered its conclusions regarding *planing* boats.[3] And in one notice of proposed rulemaking, it

[3] In 1995, the Coast Guard issued a Notice and Request for Comments on "the public's present feelings about the use of propeller guards" on "houseboats." 60 Fed. Reg. 25191 (May 11, 1995). In 1996, it issued an Advance Notice of Proposed Rulemaking "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13123 (Mar. 26, 1996); see also 62 Fed. Reg. 22991 (Apr. 28, 1997) (soliciting comments on the effectiveness of specific devices that have been suggested for reducing the number of accidents involving propellers of rented boats). In 2001, the Coast Guard issued a Notice of Proposed Rulemaking (superseding its 1996 advance NPRM) that "proposes to require owners of *non-planing recreational houseboats* with propeller-driven propulsion located aft of the transom" to install either propeller guards or "swim ladder interlocks," "ignition cut-off switches," and "clear visibility aft devices" (such as mirrors). 66 Fed. Reg. 63645, 63649 (Dec. 10, 2001) (emphasis added). The Coast Guard has never proposed propeller guards for planing boats or questioned any finding in the Subcommittee Report.

reiterated that "[u]nder current Federal statutes (46 U.S.C. 4306), the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction," 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996), a point repeated in its amicus brief in this Court. U.S. Br. 11-12. The Coast Guard has held this view since the Act was adopted. See 36 Fed. Reg. 15764 (Aug. 18, 1971); 38 Fed. Reg. 6914 (Mar. 14, 1973).

E. The Proceedings Below

The complaint alleges that in July 1995, while boating in Tennessee, Jeanne Sprietsma "was caused to fall from the boat" in which she was riding as a passenger. J.A. 101. Ms. Sprietsma, an adult woman, allegedly was struck by the boat motor's propeller and sustained fatal injuries. The engine was a 115-horsepower outboard motor manufactured by Mercury Marine and was equipped with a traditional propeller. J.A. 131.

The accident occurred in the Mitchell Creek portion of Dale Hollow Lake, a major interstate body of water that spans the Kentucky-Tennessee border. J.A. 101. Dale Hollow Lake was created by a dam built by the U.S. Army Corps of Engineers pursuant to the Flood Control Act of 1938 and the Rivers and

Harbors Act of 1946. It covers 935 square miles and has more than 600 miles of shoreline, as well as 14 commercial marinas and dozens of lodges, motels, and campgrounds. See www.orn.usace.army.mil/op/DAL/rec/ (visited Apr. 11, 2002).

The complaint asserts tort claims against Mercury Marine, alleging that its outboard motor was defective for lack of a "propeller guard." J.A. 100-110. Mercury Marine moved to dismiss the complaint, contending that petitioner's claims were preempted. The Cook County Circuit Court agreed, and the Appeilate Court affirmed, observing that "every federal court to have considered the issue" has found preemption. Pet. App. 38, 39.

The Illinois Supreme Court affirmed. It first ruled that the BSA, which applies to boats operated "on waters subject to the jurisdiction of the United States" (46 U.S.C. § 4301(a)), is predicated on the "federal maritime jurisdiction." Pet. App. 5-6. Propeller guard claims therefore "bear upon an area historically regulated by the federal government" and are governed by "admiralty" principles. *Ibid.* (quoting *United States* v. *Locke*, 529 U.S. 89, 108 (2000)).

The court then held that petitioner's state-law claims were impliedly preempted under a long line of this Court's decisions, including *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), *United States* v. *Locke*, 529 U.S. 89 (2000), and *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). The court observed that "the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's." Pet. App. 18-19.

INTRODUCTION AND SUMMARY OF ARGUMENT

Virtually every court to consider the question presented—three federal courts of appeals, three state courts, and several federal district courts—has concluded that state common law "propeller guard" claims are preempted by the Boat Safety Act. We defend this substantial body of precedent below. Before

reaching the preemption question, however, it is necessary to resolve a predicate question that is ultimately easier and clearer: whether state law applies *at all* to a claim arising out of a boating accident on navigable waters.

This case arose on the waters of Dale Hollow Lake, a large navigable waterway crossing the Kentucky-Tennessee border. As the Illinois Supreme Court held, it is therefore "within the admiralty jurisdiction of the federal courts," "an area historically regulated by the federal government." Pet. App. 6. Thus, under this Court's precedents, this case is governed *exclusively* by federal maritime law, not by the common law of Illinois or any other state. *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982); *East River S.S. Corp.* v. *TransAmerica Delaval, Inc.*, 476 U.S. 858, 864-865 (1986). Since it is undisputed that propeller guards are not required by federal law, the decision below should be affirmed without regard to preemption. There can be only *one* federal answer to the propeller guard question, and Congress has given the Coast Guard responsibility for providing that answer.

At most, therefore, this case presents the question whether a federal maritime action survives in the face of Congress's enactment of a comprehensive regulatory scheme and an expert agency's considered decision not to mandate propeller guards under federal law. Federal maritime law does not countenance ad hoc adjudication of equipment design claims that Congress delegated to the Coast Guard under detailed criteria. Petitioner asks this Court to ignore the serious safety, efficiency, and feasibility problems that the NBSAC concluded propeller guards would inflict. It would undermine maritime uniformity interests and the BSA's command of centralized agency supervision to allow juries in fifty different States to reach their own conclusions about propeller guards—some demanding one propeller guard design, other juries requiring another, and still others penalizing their use in any form.

As the court below (and eleven others) have concluded, such a fragmentary regime would frustrate the intent of Congress, which is the ultimate touchstone in this case. The reasons that convinced these courts that the federal scheme preempts state law apply *a fortiori* when the case is viewed, correctly, as one of displacement of federal common law by statute. The preeminence of federal statutes over federal common law is well settled. See *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

Even if this case were viewed as a traditional preemption case, the decision below would plainly be correct. It is undisputed that if a state legislature or agency tried to mandate propeller guards, such a requirement would be preempted by the BSA. See U.S. Br. 11-12 ("the Coast Guard's failure to promulgate a propeller guard requirement categorically precludes the States from adopting such a requirement by statute or regulation"). Common law propeller guard claims are subject to the same analysis under the BSA's preemption provision.

The savings clause on which petitioner relies—unlike the savings clause in *Geier*, 529 U.S. at 868—makes no distinction between state common law and state prescriptive law. By its terms, it applies to "liability at common law or under State law." Thus, if the clause were read in the "all-inclusive" manner that petitioner advocates (Br. 29), it would completely repeal the preemption clause. That reading cannot be correct.

Rather than drawing a line between common law and prescriptive law, Congress drew a line between product design standards, which are exclusively federal, and ordinary negligence and warranty claims—such as defective manufacture or installation—which are not preempted. Since petitioner's claim is a product *design* claim, it is preempted by the BSA's preemption provision.

Petitioner's propeller guard claim also conflicts with the Act's goals. The NBSAC found—and the Coast Guard has never questioned this finding—that propeller guards are at best

infeasible and may cause more (and more serious) accidents. If petitioner convinced a jury to require installation of such guards under state tort law, manufacturers would face a Hobson's choice: they would be liable for failing to install propeller guards in some States, and liable for installing them in others.

Moreover, state legislatures and agencies would be unable to correct the problem, because statutes and regulations in this field are expressly preempted. If the legislature of Tennessee (where this accident occurred) or Illinois (where this suit was brought) agreed with the NBSAC that propeller guards are dangerous and counterproductive, it could do *nothing* to prevent juries from imposing them. There is no reason to think that Congress intended to create such a bizarre scheme —allowing state juries to second-guess federal regulators with regard to safety measures on federal waters, but expressly preempting state legislatures from correcting their mistakes.

ARGUMENT

I. FEDERAL MARITIME LAW BARS PETITIONER'S PROPELLER GUARD CLAIM.

A. Petitioner's Claim Arises Under Federal Maritime Law.

Because this case is governed by federal maritime law, this Court need not reach the question whether federal law preempts state law in this field. Although this litigation was primarily conducted on the assumption that state common law applied, the record fully supports—indeed compels—the conclusion that the case falls within federal maritime jurisdiction, and the parties briefed and argued all points necessary to that conclusion.[4] We argued below that petitioner's claim arises in "an area outside the traditional police powers of the States—the 'historic

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[4] See Pet. Br. 19-20 (disputing the Illinois Supreme Court's conclusion that this case falls within federal maritime jurisdiction).

federal maritime jurisdiction.'" Br. 29 & n.9 (quoting S. Rep. at 17); *id.* at 36 (same). Citing this Court's maritime decisions and noting that "[b]oat safety simply is not, and never has been, a subject of traditional state regulation," we showed that Congress "plainly intended that the federal government would occupy the field of marine design and equipment requirements." *Id.* at 29, 36, 48. We explained that the "federal cast of admiralty law" serves "overriding federal maritime principles and policies," including "uniform" regulation. *Id.* at 30 n.9. The court below agreed, concluding that the case arises "within the admiralty jurisdiction of the federal courts"—"an area historically regulated by the federal government." Pet. App. 6. Accord Amicus Br. of Association of Trial Lawyers of America 21-30.

That conclusion is undoubtedly correct. The complaint here alleges that the accident occurred on Dale Hollow Lake—a large, navigable waterway with hundreds of miles of coastline. The lake was created by the U.S. Army Corps of Engineers, is home to many marinas and other commercial enterprises, and traverses the Kentucky-Tennessee border. See www.orn.usace.army.mil/op/DAL/rec/ (visited Apr. 11, 2002). See *Finneseth* v. *Carter*, 712 F.2d 1041, 1047 (6th Cir. 1983) ("Dale Hollow Lake * * * meets the Supreme Court's requirements for navigability for admiralty jurisdiction").[5]

Because it arises under federal maritime law, it follows not only that this case is not governed by any presumption against preemption; it is not subject to preemption analysis *at all*. See *Milwaukee* v. *Illinois*, 451 U.S. 304, 316 (1981). As shown below, federal maritime law cannot possibly be read to impose

[5] Federal maritime jurisdiction applies where an alleged tort occurs on navigable waters and has both a "potentially disruptive impact on maritime commerce" and a "substantial relationship to traditional maritime activity." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995); see 28 U.S.C. § 1333(1). It encompasses recreational boating accidents. *Foremost*, 457 U.S. at 674.

a federal duty to install propeller guards on boat motors, when the agency designated by Congress to make such judgments has concluded otherwise. This would defeat Congress's goal of uniformity in the BSA and substitute ad hoc jury verdicts for the expert determinations of a federal administrative agency. This constitutes an independent ground for affirmance that does not require resolution of any issue of preemption of state law.[6]

B. The Standard Of Liability In Maritime Wrongful Death Cases Is A Question Of Federal Common Law.

Federal maritime law as elaborated through the BSA—not state common law—governs whether boat engines operated on navigable waters must have propeller guards. Claims arising out of accidents on navigable waters may be brought in state court as federal maritime claims under the "saving to suitors" clause. *East River S.S. Corp.* v. *TransAmerica Delaval, Inc.*, 476 U.S. 858, 865 (1986); *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 520 U.S. 875 (1997); 28 U.S.C. § 1333(1). But even then, substantive rules of federal admiralty law apply regardless of whether the plaintiff invokes admiralty jurisdiction. 14A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3671 (1998); *East River*, 476 U.S. at 864 ("With admiralty jurisdiction comes the application of substantive admiralty law"); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (in maritime tort action brought in state court, "[t]he source of the governing law applied is in the national, not the

[6] A respondent may rely on any ground supported by the record when seeking affirmance. The maritime law question addressed by the court below was a necessary predicate and subsidiary element of its decision, and is equally important to this Court's decision. It is intimately connected with the preemption issue and rests on identical statutory provisions. See *LeBron* v. *NRPC*, 513 U.S. 374, 378-382 (1995); *Caterpillar* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996); *Kolstad* v. *ADA*, 527 U.S. 526, 540-541 (1999); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Arkansas Elec. Coop.* v. *Arkansas Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983) ("Commerce Clause" issue fairly subsumes "pre-emption" issue); Opp.11-12, 18, 23; pp. 29-36, *infra*.

state, government"); *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 641 (1981) (in "admiralty cases * * * our federal system does not permit the controversy to be resolved under state law"). Any "attempted changes by the States in the substantive admiralty law" are unlawful. *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001); accord *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994).

Petitioner argues (at 19-20) that the fact that "federal courts possess admiralty jurisdiction" over "maritime torts involving recreational boats" does not "strip the States of their interest in ensuring that the victims of maritime torts be compensated for their injuries." But the only case he cites for that proposition, *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 216 n.14 (1996), dealt only with *damages*, not *liability*. This Court has repeatedly "recognized that vindication of maritime policies demand[s] uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." *Id.* at 210. On remand in *Yamaha*, the Third Circuit concluded that "federal maritime standards" must govern liability. 216 F.3d 338, 351 (2000). See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970). Thus, neither *Yamaha* nor any other decision of this Court allows petitioner to evade federal maritime principles. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) (requiring federal uniformity in maritime case notwithstanding general savings clause).

C. Where Congress Has Empowered An Expert Agency To Prescribe Uniform Standards For Equipment Design, It Would Be Inappropriate To Permit Juries To Create Inconsistent Duties.

It is black letter law that courts and juries applying common law must act within limits established by legislatures. This principle fully applies to maritime common law. "While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the

field." *American Dredging Co.*, 510 U.S. at 455. Because Congress has enacted a law directing the Coast Guard to set uniform design standards for recreational boats, courts and juries may not set their own standards under the common law.

Milwaukee v. *Illinois*, 451 U.S. 304 (1981), confirms this conclusion. There the Court held that federal environmental legislation displaced federal common law interstate nuisance claims based on pollutant discharges. Noting that Congress had charged a federal agency with supervising such problems, the Court explained that "federal common law applies until the field has been made the subject of comprehensive legislation or authorized administrative standards." *Id.* at 314; see *id.* at 320 ("Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme"). Because the statute at issue established a "comprehensive regulatory program supervised by an expert administrative agency" trained to address difficult "technical problems," the Court refused to apply "vague and indeterminate nuisance concepts and maxims of equity jurisprudence" that were bound to be "sporadic" and "ad hoc." *Id.* at 317, 325. Where the issue is the scope of federal common law in the face of congressional action, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Id.* at 317. "Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with common sense and the public weal' when Congress has addressed the problem." *Id.* at 315, 317.

Displacement of federal common law by federal statutory law thus differs from preemption of state law. *First*, because federalism concerns are absent, there is *never* any presumption against displacement. Indeed, in light of separation-of-powers presumptions in favor of legislative over judicial policymaking,

the presumption runs the other way. *Milwaukee*, 451 U.S. at 316-317. *Second*, in the case of statutory displacement, there is no requirement of express statement (as in express preemption) or clear conflict (as in implied preemption). Rather, "the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Id.* at 315 n.8. Nothing more is needed. See *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (damages for "loss of society" under general maritime law were displaced when Congress enacted the Death on the High Seas Act, which addressed the question of damages without providing for such recoveries); *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116 (1998) (refusing to recognize maritime survival actions where Congress did not authorize such actions in Death on High Seas Act); *East River*, 476 U.S. at 864 ("*Absent a relevant statute*, the general maritime law, as developed by the judiciary, applies") (emphasis added).

The BSA plainly represents "a single comprehensive Act dealing with the subject of safety for boats" (S. Rep. at 6) that displaces propeller guard claims asserted under federal common law. Congress assigned the task of establishing uniform design standards to the Coast Guard. Pursuant to the Act, the NBSAC, a statutorily created body (46 U.S.C. § 13110), recommended against a propeller guard requirement after 18 months of study, explaining that such a requirement would impair public safety, degrade fuel economy, and confront manufacturers with insurmountable feasibility problems. The Coast Guard in turn refused to mandate propeller guards, pointing to problems of economy and feasibility and explaining that "available accident data" do "not support such a requirement." Pp. 8-13, *supra*. As the Solicitor General states, "the agency has made a considered decision to forgo *federal* regulation" of propeller guards. U.S. Br. 18. That decision is controlling, as there can be only *one* federal rule on propeller guards.

It would be inconsistent with the design of the BSA to allow jury decisions under generalized maritime criteria applied in fifty States to second-guess or even supplement the Coast Guard's decision on the same subject. Congress delegated standard-setting authority to a single expert agency, and expressly forbade states to make or enforce any standard not "identical" to the federal standard. 46 U.S.C. § 4306. Congress determined that this approach would best achieve the goal of uniformity of regulation in this field.

The policy of uniformity lies at the heart of both the BSA and federal admiralty law. Admiralty law does not recognize any claim that "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917); see *Foremost*, 457 U.S. at 674-675 (federal interest in governing maritime commerce "can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct"); *id.* at 677; *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574-575 (1874) (in "all cases of admiralty and maritime jurisdiction," it is "unquestionable" that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country"); *Moragne*, 398 U.S. at 401.

Allowing juries to set their own standards would frustrate this goal of uniformity. If an Illinois jury mandated installation of propeller guards, manufacturers would be forced by threat of actual and punitive damages to install them, exposing boaters to the very dangers identified in the NBSAC's report—dangers the Coast Guard has never denied in its subsequent review of propeller guards or in its brief in this Court. In subsequent cases, persons injured by propeller guards—because of their enlargement of the underwater profile of the drive system, interference with safe steering, or capacity to entangle and mutilate limbs—could bring suit in other jurisdictions asserting that installation of such guards was unreasonably dangerous,

citing the NBSAC's report as conclusive evidence. Inconsistent decisions in such cases would be driven by the facts of particular accidents and understandable human sympathy, but without the industry-wide experience developed through the NBSAC's 18-month investigation. Given Congress's preference for uniform design standards, that result should not be countenanced under federal maritime law. *United States* v. *NASD, Inc.*, 422 U.S. 694, 734-735 (1975) (federal common law should be construed to avoid "duplicative and inconsistent standards" or "conflicting judgments that might be voiced by courts"). If controversial devices such as propeller guards are to be mandated, this should be done on a uniform basis by the expert agency charged with protection of the general public.

Courts applying federal common law defer to administrative schemes because "a federal official with an overview of all possible ramifications of a particular requirement" is in "the best position to balance all the competing interests." *Locke*, 529 U.S. at 110. When it comes to "far-reaching" "policy questions" that require weighing a broad "range of factors * * * beyond the record of a single lawsuit," expert agencies applying statutory criteria are better suited than common law courts to gather evidence and take into account multiple competing interests. *Texas Indus.*, 451 U.S. at 646-647. Agencies possess "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims" and are able to "control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940).

"It was precisely to take advantage of the expertise and flexibility available in the administrative process" that Congress "opted for a system of administrative rather than statutory standards." S. Rep. at 17. If courts applying general maritime law could require propeller guards, that would usurp the quasi-

legislative role that Congress has assigned to the Coast Guard. See H.R. Rep. at 2 ("It is time that recreational boats be built in accordance with standards prescribed by one Federal agency"); *supra* pp. 1-3.[7]

D. Propeller Guard Claims Are Not Cognizable Under The Majority Common-Law Rule, Which Federal Maritime Law Generally Follows.

The decision below thus must be affirmed on the ground that common law standards for boat design have been displaced by an Act that vests standard-setting authority in an expert agency, which has made a considered decision not to require propeller guards. Even if federal maritime law had *not* been displaced by the BSA, however, the decision below would still be correct, because federal maritime law itself would not countenance any suit premised on a common law duty to install propeller guards.

Federal maritime law generally serves the goal of uniformity by incorporating common law rules adopted in a majority of the States. *E.g.*, *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573, 587-588 (1974). Courts in maritime products liability actions, for example, have looked to RESTATEMENT (SECOND) OF TORTS § 402A. *E.g.*, *East River*, 476 U.S. at 864-865. But in adopting substantive rules of conduct, this Court has taken a cautious approach, declining to impose novel duties or untested theories

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[7] See James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1576 (1973) ("the legislative and administrative processes are institutionally suited" to "establishment of specific product design standards"); Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1219 (1996) ("agencies are generally well-equipped to make objective decisions about risk management and other product safety issues" because "agency personnel are likely to be familiar with the technical aspects of the products they regulate," "the procedures by which product safety standards are formulated provide the agency with opinions and information from a wide variety of sources," and "agencies can take a diversity of interests into account").

of liability. In *East River*, for instance, the Court recognized that strict products liability fit comfortably within admiralty law because it was "long a part of the common law of torts" and had been "overwhelmingly" adopted by the federal courts of appeals. *Id.* at 865. But it went on to reject the novel theory that liability may result from a product "injuring itself" that a majority of States had not accepted. *Id.* at 871.

Similarly, in *Miles* v. *Apex*, 498 U.S. 19 (1990), a wrongful death case brought under maritime law, this Court refused to recognize a new cause of action for loss of society and future earnings. While acknowledging "strong policy arguments for allowing such recovery," the Court explained that "[m]aritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* at 35-36. The Court "will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death." *Id.* at 36.

The Illinois courts that heard this case were correct to adopt a similarly circumspect approach to petitioner's propeller guard claim, which has been rejected on the merits by virtually every court to consider it. *E.g.*, *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990); *Fitzpatrick* v. *Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993); *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993); *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Beech* v. *Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991); *Veal* v. *Teleflex, Inc.*, 586 So. 2d 188 (Ala. 1991); see also n.9, *infra*. *Cf. Seymour* v. *Brunswick Corp.*, 655 So. 2d 892 (Miss. 1995) (remanding for proceedings under changed state precedent but expressing no opinion on merits of propeller guard claim). No court in *any* jurisdiction has adopted a mandatory propeller guard standard.

This makes perfect sense in light of the NBSAC's exhaustive study concluding that propeller guards are unhelpful, infeasible, and downright dangerous. Leading authorities recognize that compliance with regulatory requirements is typically enough to show compliance with any applicable common law duty. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 233 (5th ed. 1984) ("Where there is a normal situation, clearly identical with that contemplated by the statute or regulation, and no special circumstances or danger are involved, it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required"). That rule is particularly relevant here, given manufacturers' conscious and universal decision not to install dangerous propeller guard devices and the Coast Guard's continuous monitoring of the propeller guard issue. *E.g.*, *Jackson* v. *OMI Corp.*, 245 F.3d 525, 528 (5th Cir. 2001) (rejecting design defect claim in view of Coast Guard standard and general industry custom).[8]

It would be especially anomalous to allow a jury to contradict the majority view on propeller guards. Such a ruling—which would have the character of a general legislative standard and would not pertain to unique local conditions—could effectively force manufacturers to install such devices. Given the realities of mass production and the mobility of boats across state borders (as the facts here illustrate), such a requirement could quickly visit detrimental consequences on residents of other States. And because the BSA preempts state legislatures from prohibiting propeller guards, they would be helpless to protect their citizens against such consequences. See U.S. Br. at 11-12

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[8] It is also settled that a claim of this sort need not go to the jury but may be disposed of by motion. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. *f* (1998) ("The necessity of proving a reasonable alternative design as a predicate for establishing design defect" is "addressed initially to the courts"). See also Ill. S. Ct. Br. for Mercury Marine at 59-72 (collecting authorities).

(the Act "categorically precludes" States from prescribing any "statute or regulation"). This perverse result goes "well beyond the limits of Congress' ordered system" (*Miles*, 498 U.S. at 36) under the BSA. See *East River*, 476 U.S. at 870-876 (exercising "traditional discretion," Court orders dismissal of tort claims and declines to recognize new "duty" under maritime law that would lead to "increased cost to the public," expose manufacturers to "vast sums" in damages, and lead to inconsistent legal obligations); *Jensen*, 244 U.S. at 217 (refusing to recognize duty "[w]here the subject is national in its character, and admits and requires uniformity of regulation affecting alike all the States * * * Congress can alone act upon it and provide the needed regulations"). For all these reasons, the Illinois Supreme Court's decision in this case should be affirmed under federal maritime law.

II. PETITIONER'S CLAIM IS ALSO PREEMPTED BY THE BOAT SAFETY ACT.

Preemption occurs in three principal ways. First, Congress may expressly preempt state law. *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). Second, Congress may override state law by indicating an intent to occupy the field. *Id.* at 79. Third, state law may "conflict" with federal law, either by making it impossible "to comply with both state and federal requirements" (*ibid.*), or by creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The "categories of preemption," however, are not "rigidly distinct"; nor is the analysis mechanical. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000). Rather, "'the purpose of Congress is the ultimate touchstone.'" *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). Preemption is a matter of statutory interpretation that turns on the language, structure, and purposes of the enactment. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). Further, the presence of a "unique federal concern changes what would

otherwise be a conflict that cannot produce pre-emption into one that can." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988).

Like the court below, all nine federal courts to consider the issue have concluded that propeller guard claims are preempted on one or more preemption grounds.[9] The text, structure, purpose, and history of the BSA *all* demonstrate that this formidable body of precedent is correct.

A. The Express Terms Of The Boat Safety Act Manifest Congress's Intent To Preempt Common Law Design Requirements.

1. The express preemption clause bars petitioner's claim.

The BSA's preemption clause provides in pertinent part:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the [Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions within the State) that is not identical to a regulation prescribed under section 4302 of this title.

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[9] *Lady* v. *Neal Glaser Marine*, 228 F.3d 598 (5th Cir. 2000); *Lewis* v. *Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), cert. dismissed, 523 U.S. 1113 (1998); *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Moss* v. *OMC*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *OMC*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *OMC*, No. J90-0011(L) (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); accord *Ryan* v. *Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. 1992).

46 U.S.C. § 4306. The text of § 4306 is sweeping: no State may establish or enforce any law requiring an item of boat equipment that is not "identical" to an extant Coast Guard regulation. The sole exception is for state regulation of "uniquely hazardous" local conditions, and even then the Coast Guard retains a veto. The Act's plain language demonstrates that petitioner's claim is preempted: he seeks to "establish" and "enforce" a rule of state law requiring propeller guards on a "recreational vessel," and that rule is "not identical to" any Coast Guard regulation.

Section 4306 is far broader than the law at issue in *Geier*, which preempted state law only when "a Federal motor vehicle safety standard * * * *is in effect*." 529 U.S. at 867 (emphasis added). Under the Motor Vehicle Safety Act ("MVSA"), States were free to impose safety standards if no federal standard was in effect. Under the BSA, by contrast, the *absence* of a federal standard is preemptive: States may not establish or enforce any standards that are not identical to federal standards. As the Solicitor General acknowledges (at 11-12), "unless and until the agency has promulgated a safety standard dealing with a particular matter," the Act "categorically precludes the States from adopting such a requirement by statute or regulation."

Thus, when the Solicitor General (at 19, 22-26) relies on *Geier* in contending that the Coast Guard's decision not to require propeller guards cannot have preemptive effect because that decision was not embodied in a "formal safety standard" (accord Pet. Br. 36-37), he overlooks the crucial difference between the statutory preemption clauses: preemption under the MVSA is triggered only by promulgation of a federal "safety standard," but preemption under the BSA extends to federal absence, as well as presence, of regulation. Obviously, that cannot require formal agency action.

In an attempt to minimize the BSA's plain language, petitioner argues that the terms "law," "requirement," and "standard" refer only to "prescriptive requirements" and do not include state *common law* requirements, and that the phrase "State or

political subdivision of a State" refers only to legislatures and agencies. Br. 24, 26-28. These arguments are untenable.

First, the notion that the terms "law," "requirement," and "standard" do not include common law duties is foreclosed by precedent. In *Medtronic*, for example, a majority of this Court agreed that the term "requirement" reaches state tort claims. As Justice O'Connor explained, "state common-law damages actions operate to require manufacturers to comply with common-law duties," and thus impose "requirements" within the "ordinary meaning" of that term. 518 U.S. at 510-511 (concurring and dissenting); accord *id.* at 504 (Breyer, J., concurring). Similarly, *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), held that one of the statutes at issue there preempted common law duties, although it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" *Id.* at 520-524 (plurality opinion); *id.* at 548-549 (Scalia, J., concurring). It was immaterial that the preemption clause "fail[ed] to include a specific" reference to common-law claims: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* at 521; see also *id.* at 548-549 (Scalia, J., concurring).

The terms "standard" and "law" likewise embrace common law duties. In *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), the Court unanimously agreed that "[l]egal duties imposed * * * by the common law fall within the scope of" a clause that preempts "any state 'law, rule, regulation, order, or standard relating to railroad safety.'" See also *Asahi Metal Indus. Co.* v. *Superior Ct.*, 480 U.S. 102, 114-115 (1987) (noting that California products liability law set "safety standards"). And numerous decisions of this Court have held that common law is fairly encompassed within the term "law" or "laws." See *e.g.*, *Cipollone*, 505 U.S. at 522-523; *id.* at 549 (Scalia, J., concurring); *Illinois* v. *Milwaukee*, 406 U.S. 91, 100 (1972) (the

"natural meaning" of "laws," as used in 28 U.S.C. § 1331, includes common law claims); *Norfolk & W.R. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938).

This substantial body of precedent accords with the common sense proposition that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *Geier*, 529 U.S. at 882 ("this Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question"). That is why this Court "has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Garmon*, 359 U.S. at 243. Where, as here, Congress expresses a strong intent to fashion uniform federal standards and preempt inconsistent state duties, it is artificial to read terms such as "law," "standard," or "requirement" in a grudging way so as to exclude state common law duties.

Petitioner's argument also ignores the fact that § 4306—in contrast to the statute in *Geier*, 529 U.S. at 869—preempts state *enforcement* of laws, requirements, and standards pertaining to recreational boat design. Enforcement plainly encompasses judicial action, and it is hard to imagine why Congress would bar state courts from enforcing *statutory* but not *common law* standards. "The effects of the state agency regulation and the state tort suit are identical," and it would be "anomalous" to "distinguish between them for pre-emption purposes." *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring). That result would be *especially* anomalous here because—as the government concedes (at 11)—state legislatures cannot overturn any objectionable common law rules. See *infra* p. 41.

Second, petitioner incorrectly asserts (without citation to any authority) that the phrase "State or political subdivision of a

State" does not include state courts. The preemption clause at issue in *Medtronic* barred any "State or political subdivision of a State" from establishing requirements different from those imposed by federal law. 518 U.S. at 481. But that did not deter this Court from finding common law claims to be within the Act's preemptive scope. It is frankly incoherent to argue that the States' judicial systems are not the "State" or one of its "political subdivisions." A jury deciding petitioner's claim could not rule in his favor without finding that Mercury Marine failed to satisfy a legal standard imposed by state law; without such a finding, an award of damages would be lawless. In short, "common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State." *Shelley* v. *Kraemer*, 334 U.S. 1, 17 n.19 (1948).

2. *The legislative history of the BSA confirms that Congress preempted the design standards field.*

The BSA's legislative history emphatically reinforces the plain meaning of § 4306. The House Report explains (at 2, 11) that "[i]t is time that recreational boats be built in accordance with standards prescribed by one Federal agency"—to "pre-emp[t] the field on boating standards or regulations." The Senate Report states that "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." The BSA thus "assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. at 14, 20. The legislative record is replete with similar statements. See *supra* p. 3 & n.1.

Congress also recognized that maritime commerce and boat design have never been subjects of state police power regulation. Rather, the Act implicates Congress's "historic federal maritime jurisdiction," and "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters." S. Rep. at 17, 20. These findings accord with 200 years of this Court's

precedents. See *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852); accord *Locke*, 529 U.S. at 99 (recognizing "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority").

Thus, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers" in the area of "maritime commerce." *Locke*, 529 U.S. at 108. States may "regulate local ports and waters under appropriate circumstances"—where their regulations "do not require adjustment of systemic aspects of the vessel"—but may not interfere "with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce." *Id.* at 108-109, 112. This maritime context fundamentally distinguishes prior cases such as *Geier*.

Petitioner notes that *Locke* involved "foreign affairs" and "international commerce," whereas this case involves a "noncommercial boat." Br. 19-20. But federal authority over maritime commerce is not limited to international matters or commercial boats. *Foremost*, 457 U.S. at 676. Congress invoked "the long history of preemption in maritime safety matters" in passing the BSA. As it recognized, boats are built for interstate markets, and they routinely cross state lines (as here). As the Solicitor General explained (Br. 21) in *Buckman Co.* v. *Plaintiff's Legal Committee*, No. 98-1768, an "'assumption' of non-preemption does not apply 'in an area where there has been a history of significant federal presence,'" and "maritime commerce constitutes such an area."

Petitioner further argues (at 5, 23) that the Coast Guard's authority is "'permissive and not mandatory'" and that the Act establishes only "minimum" standards, facts that he says are "inconsistent with the notion that Congress intended to preempt the entire field." See also U.S. Br. 20-21. These arguments lack merit.

First, it is *Congress's intent* that governs whether the BSA preempts the field. The legislative history reveals both that Congress viewed the BSA as a comprehensive statute that would occupy the field and that it expected the Coast Guard to prescribe all necessary boat design standards.[10] The Coast Guard has done just that, including many fashioned to prevent the type of accident that gave rise to this suit. See *supra* pp. 6-7.

Second, petitioner's argument ignores Congress's intent to establish *uniform* standards. As the Senate Report explains (at 20), Congress allowed the States to "impose requirements * * * which go beyond the federal requirements" only when necessary "to meet uniquely hazardous conditions or circumstances within the State" (§ 4306). Even in that narrow area—which covers only "the carrying or use of marine safety articles"—Congress allowed the Coast Guard to reject state rules, to preserve uniformity in boat design standards.[11]

Third, *Ray* expressly rejected the proposition that Congress's use of "minimum standards" in an Act establishing federal design standards "requires recognition of state authority to impose higher standards than the [Coast Guard] has prescribed." 435 U.S. at 168 n.19. Where "it is sufficiently clear that Congress directed the promulgation of standards on the national level," "minimum standards" (which manufacturers

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[10] See S. Rep. at 17 ("While the language of Section 5 is permissive and not mandatory, the Committee expects that initial standards will be promulgated as soon as practicable"); *ibid.* (Coast Guard standards should cover "a broad variety of features," including "characteristics [of a vessel or related equipment] that reasonably bear on safety" and especially those involving "a serious safety hazard"); *id.* at 6 (the BSA is "a single comprehensive Act dealing with the subject of safety for boats"); H.R. Rep. at 9, 10 (prior law "did not provide a total answer in the field," but the BSA is "a single comprehensive piece of legislation").

[11] See H.R. Rep. at 16 (explaining that, even under this narrow exception, "it is intended that the uniformity of standards expected under this Act shall not be upset by excessive special requirements by individual states").

may exceed) may not be supplemented by state law. *Ibid.* Given the BSA's legislative history and the federal interest in uniformity, *Ray*'s holding (reaffirmed in *Locke*) that Title II of the PWSA preempts the field should govern this case. See *Locke*, 529 U.S. at 110-111. This is a context that "peculiarly * * * calls for uniform law," in which the States may not "supplement" the obligations imposed by federal law. See *Pennsylvania R.R.* v. *Public Serv. Comm'n*, 250 U.S. 566 (1919) (holding that the Safety Appliance Act, which imposes safety design requirements on railroads, preempts the field; states cannot impose additional "guard rail" obligations); *CSX*, 507 U.S. at 673-675 (federal safety program for railroads "preclud[es] additional state regulation"; claim of "negligence" sought to impose "general rule," and did not address "local conditions").

The Solicitor General asserts that the field "of recreational boating safety" is not one "'that Congress intended the Federal Government to occupy exclusively.'" U.S. Br. 14. But the fact that Congress did not preempt the entire field of "recreational boating safety"—which is clear and undisputed, given Congress's stated intention to include the States in law enforcement and education (see S. Rep. at 15)—does not mean that it did not preempt the field of *design standards for recreational boats*. The Solicitor General's argument overlooks the broad language of § 4306, the legislative history stating that Congress preempted the field of design standards, and the maritime context in which Congress has long been the predominant regulator.

3. The Boat Safety Act's savings clause cannot be read to save petitioner's defective design claim.

Petitioner's last response is that the BSA's preemption clause cannot be read to bar his claim because § 4311(g), the Act's savings clause, "expressly *preserves* all common-law claims." Pet. Br. 28. Relying on *Geier*, which he says involves a "nearly identical" savings clause, he argues that Congress drew a line between state common law duties and duties imposed by

prescriptive regulations. *Id.* at 29-30. According to him, the savings clause is "all-inclusive" and provides no "basis for exempting *any* defendant from *any* common-law liability." *Id.* at 29 (emphasis added).

This argument flies in the face of the plain language of the BSA's savings clause. In contrast to the savings clause at issue in *Geier*—which preserved "liability under common law," 15 U.S.C. § 1397—the BSA's savings clause draws no distinction between common law and prescriptive law: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). By its terms, § 4311(g) applies equally to "State law" and to "common law." It is therefore impossible to read it as "all-inclusive," since that reading would repeal the preemption clause in its entirety. That cannot be correct.[12]

It logically follows that § 4311(g) must be read to save some *subset* of state law and common law—to preserve such law *within a limited domain*. The legislative history confirms this reading. It shows that Congress added the savings clause as a "technical" amendment (see *supra* pp. 5-6), "to clarify that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort liability *which otherwise could pertain*"—*i.e.*, claims "under *the usual tort law* concerning negligence or warranties." S. Hearing at 66 (emphasis added). The Senate Report explains (at 32) that the "purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards

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[12] Petitioner has conceded (Ill. Br. 12) that "State law" includes "legislative and regulatory standards." Under his reading of § 4311(g), therefore, manufacturers could be held liable under state statutes or regulations imposing design requirements flatly inconsistent with Coast Guard rules. A general savings clause should not be construed to undermine the "established federal-state balance in matters of maritime commerce" and "the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

promulgated under the Act will not be a *complete defense* to liability" (emphasis added). Thus, rather than limiting federal preemption of design standards, the savings clause merely bars manufacturers from relying on compliance with federal law as an absolute defense where state law properly plays a role.

Geier recognized that savings clauses that turn on the consequences of "compliance with a federal standard" may "simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law," rather than addressing preemption. 529 U.S. at 869. And here there is a compelling reason to reject a reading of this "technical amendment" that would save every common law claim. Congress saved both "State law" *and* "common law." It did not draw a line between tort suits and prescriptive requirements, and reading the savings clause in an "all-inclusive" way would nullify the preemption clause, a central feature of the BSA. This critical difference between the savings clauses here and in *Geier* confirms that the Court's reconciliation of the preemption and savings clauses there cannot govern this case.[13]

Nothing in the legislative history indicates that Congress preserved design defect claims. As of 1971, when the BSA was enacted, design claims requiring departures from industry practice were far from "usual tort law."[14] And in the very same

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[13] *Geier*, of course, considered issues of highway safety, a traditional subject of state police power. Issues of maritime safety, by contrast, are the province of federal law. See *supra* pp. 17-20.

[14] See Henderson, *supra*, 73 COLUM. L. REV. at 1565 & n.143 (explaining, based on review of "the thousands of products liability decisions reported during the last ten years," that "[i]n the great majority of recent cases, courts have refused to allow juries to pass independent judgment upon the adequacy of defendants' conscious design choices"; the "handful" of exceptions, moreover, "do not reflect a general shift in judicial attitudes towards reviewing conscious design choices so much as they reflect unusual pressures generated by the peculiar facts of these cases"). We are aware of *no* pre-BSA reported decision in which a jury or court sustained a claim

statement in which he indicated that the Coast Guard "would have no objection" to adding a savings clause "to clarify" the Act, Admiral Bender observed that "the Federal Government cannot now preempt the *boating standards* field," allowing "States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply." He concluded that "*[t]his legislation will correct these problems*." S. Hearing at 50, 66 (emphasis added). Congress cannot have intended to prevent States from regulating boat design under § 4306, while inviting them to do so under § 4311(g).

Read in light of the stated legislative purpose, § 4311(g) preserves several types of tort claims. *First*, as the legislative history indicates, the savings clause does not permit manufacturers to avoid liability for breach of contractual warranties. S. Hearing at 66.[15] *Second*, the savings clause preserves claims against boat owners and operators for negligent operation. Regulation of "safe boat operation and use * * * was felt to be appropriately within the purview of state or local concern." S. Rep. at 20. *Third*, manufacturers may be sued for negligently *manufacturing* or *installing* marine products. For example, a manufacturer could be held liable for selling defective start-in-gear devices that allow motors to start with moving propellers. See 33 C.F.R. § 183.710; *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. App. 1988) (the BSA does not preempt claims based on a defectively manufactured throttle).

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remotely similar to the propeller guard claim in this case. See *Tallentire*, 477 U.S. at 230 (general savings clause was not intended to preserve "largely nonexistent" state law claims).

[15] It is revealing that the statement in favor of a savings clause quoted by petitioner (at 31) refers to "consumers' private remedies." S. Hearing at 88. That is more likely a reference to warranty actions than to personal injury actions, which often are not brought by "consumers" of the product.

Most common law claims involving marine products fall within these categories. Our reading of § 4311(g) thus assures "that there are some significant number of common-law liability cases to save" (*Geier*, 529 U.S. at 868), while giving meaning to *all* of the Act's terms. Petitioner's reading, by contrast, lacks any support in the Act's legislative history, effectively repeals the preemption provision, and disregards the plain language of the savings clause.

In the hope of persuading this Court that the savings clause here is "almost identical" (Pet. Br. 30) to the savings clause in *Geier*, petitioner treats § 4311(g) as if it applied only to "common law" and did not contain the words "or under State law." Only in a single footnote do petitioner and the Solicitor General even mention the "under State law" language of § 4311(g), which so evidently distinguishes this case from *Geier*. In one offhand sentence, they dismiss the reference to "State law" as "merely indicat[ing] that some forms of damages liability in some states are imposed via statute rather than common law." See Pet. Br. 30 n.11; U.S. Br. 13 n.2. Both cite *Cipollone*, 505 U.S. at 518, as their sole authority for this reading.

This reading of § 4311(g) has no support in the text, which encompasses all forms of "State law," not just laws pertaining to "damages liability." Nor does the reading derive any support from the legislative history, which speaks of saving remedies for breach of warranty, of the "usual tort law of negligence," and of protection for "consumers"—while declaring that the BSA preempts the field of "boating standards" applicable to "manufacturers." Nor does *Cipollone* support petitioner's position. The Acts at issue there did not contain any savings clauses. The Court merely noted that the phrase "State statutory law" in 15 U.S.C. § 4406(c) would ordinarily encompass "damages" statutes. 505 U.S. at 518. The question here is whether a savings clause may be read to save *only* "damages"

statutes where it saves "State law" without qualification. *Cipollone* is irrelevant to that issue.[16]

Finally, petitioner's and the Solicitor General's reading of the BSA would lead to absurd results that Congress could not have intended. Under § 4306, the States may not enact *any* standards relating to propeller guards. As the Solicitor General explains (at 11, 15), "unless and until the agency has promulgated a safety standard dealing with a particular matter," state safety standards are "categorically preempted." Thus, if an Illinois jury required propeller guards, Illinois legislators would be powerless to implement another view of state safety policy by enacting statutes rejecting that result for future cases.[17]

This would be highly disruptive of the States' law-making power. Lay juries would have more power than elected officials to make state law. Perhaps Congress could enact such a scheme if it wanted to, but there is no reason to presume that it did. The BSA expresses a statutory preference for expert and uniform judgment in the promulgation of design standards. Every standard must be "reasonable" and justified by a cost-benefit analysis. See *supra* p. 2. Congress opted for this approach "precisely to take advantage of the expertise and flexibility available in the administrative process." S. Rep. at 17. It is hard to believe that it wished to give juries in the fifty States *absolute power*—unhindered by the usual checks and balances of state government—to impose their own design standards.

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[16] Under petitioner's reading of § 4311(g), moreover, the States would be free to pass a statute mandating propeller guards that is enforceable through actual and punitive damages. That reading hardly reconciles the savings clause and the preemption provision.

[17] This was not true under the statute in *Geier*, which permitted individual States to enact divergent design standards unless a federal standard was "in effect." 529 U.S. at 867. Thus, if a jury imposed a duty that a state legislature disapproved, the legislature could set its own standard for future cases.

B. Petitioner's Claim Would Frustrate The Purposes Of The Boat Safety Act.

Whether or not the BSA preempts *all* design defect claims, petitioner's claim conflicts with the Act and stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This form of conflict preemption is unaffected by a general savings clause. *Geier*, 529 U.S. at 869-872. In enacting the BSA, Congress intended to replace a patchwork of state regulation with a single uniform, feasible, economic set of safety rules established by an expert agency and imposed on a prospective basis. Petitioner's attempt to impose a propeller guard requirement through tort litigation would frustrate each of those purposes.[18]

1. Petitioner's claim conflicts with the core objectives of the Act.

a. The BSA's Goal of Uniformity. The BSA seeks to protect those who mass-produce boats or motors from having to satisfy varying (and potentially conflicting) state design standards that interfere with interstate mobility. Congress's commitment to uniform design standards is reflected in its limitation of state involvement to requirements addressing "uniquely hazardous" local conditions (§ 4306). The legislative history is replete with evidence of "the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. at 20; see *supra* p. 3 & n.1. As the court below observed: "[u]niformity is particularly important where * * * the federal statute relates to a product that is inherently mobile." Pet. App. 7.

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[18] Petitioner incorrectly asserts (Br. 35) that *Geier* held that, where a savings clause exists, "any finding of preemption is 'disfavored.'" The Court there expressly rejected this "special burden" theory. See 529 U.S. at 872-874. Petitioner quotes from a section of the opinion setting forth an argument that the Court proceeded to disapprove. Accord *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001).

To allow individual state court juries to impose damages, including punitive damages, against manufacturers for failure to install propeller guards would clearly frustrate Congress's intention to achieve uniformity in this field. *Boyle*, 487 U.S. at 508 ("where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules"). If an Illinois jury required propeller guards, respondent would have two options: build all motors with guards, or build motors for Illinois with guards and motors for other States without them. If respondent built one set of motors, Illinois would effectively be imposing a controversial design upon the entire nation. See *Locke*, 529 U.S. at 112 (States may regulate "local peculiarities," but may not regulate "outside the jurisdiction" or "require adjustment of systemic aspects of the vessel"); *BMW, Inc.* v. *Gore*, 517 U.S. 559, 571 (1996) ("one State's power to impose burdens on the interstate market for [boats]" is "constrained by the need to respect the interests of other States"). If it built two sets of motors, that would frustrate Congress's objective of "assur[ing] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S. Rep. at 20.

Worse, while petitioner's Illinois jury might impose damages on respondent for not installing propeller guards, a jury in another state (or county) might impose damages if it installed them. *Elliott*, 903 F.2d at 1509 (reversing a verdict requiring propeller guards and stating that "the industry's adaption of propeller guards at this point would not only be infeasible, but unwise, unsafe and unfortunate"). And given the frequency with which boats cross state borders (as here), manufacturers could not limit their exposure to liability even if they limited sales of certain motors to certain States. Nor could state legislatures solve the problem, as they are expressly preempted from establishing any standards not identical to federal standards.

Petitioner's claim should not be permitted to frustrate the BSA's policy of protecting interstate commerce. *Bibb* v. *Navajo*

Freight Lines, 359 U.S. 520 (1959) (invalidating state requirement for contoured mudflaps where 45 States allowed straight mudflaps); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 775 (1945) ("such regulation, if any, must be prescribed by a single body having a nation-wide authority"); *Kassel* v. *Consolidated Freightways*, 450 U.S. 662 (1981). As this Court has explained, it is "incongruous * * * that a Congress seeking uniformity in maritime law would intend to allow widely divergent state [tort] law" to upset it. *Tallentire*, 477 U.S. at 230.

It is no answer to say that this case involves only the imposition of damages, and not the setting of inconsistent standards. Such an argument disregards the regulatory effect of tort law. "[T]his Court's pre-emption cases ordinarily *assume* compliance with the state law duty in question," and "a rule of state tort law imposing [a duty to install equipment] by its terms would * * * require[] manufacturers of all similar [products] to install [such equipment]." *Geier*, 529 U.S. at 881, 882. A verdict holding a manufacturer liable for not installing a propeller guard would obligate the manufacturer to retrofit *all similar motors* within the State; its effect would not be limited to "a *particular* boat engine." Pet. Br. 40. Thus, Congress's interest in uniformity is directly implicated by inconsistent tort judgments.

b. The RSA's Requirement of Administrative Review under Statutory Criteria. Allowing petitioner's claim to proceed would also contravene Congress's intent that design standards be imposed only after deliberation by expert administrators applying detailed statutory criteria. See *supra* p. 2. The Coast Guard must consult with the NBSAC—whose 21 members include state regulators—in deciding whether to regulate. *Ibid.* Congress directed that the agency balance competing interests, conduct a cost-benefit analysis of every proposed rule, consider "technical feasibility," and require compliance only when "economically and physically reasonable in relation to the hazard." S. Rep. at 17-18. It also required that rules be "stated, insofar as practicable, in terms of performance." See *supra* p. 1.

"It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards * * * that the Committee opted for a system of administrative rather than statutory standards." S. Rep. at 17. Even state legislatures may not regulate design; the agency's authority is *exclusive*.

Unlike the Coast Guard, juries lack technical expertise in matters of maritime safety and hydrodynamics and focus narrowly on the facts of particular cases. They are not accustomed to taking into account the diverse interests that are affected by quasi-legislative standards. And they are unable to measure performance, to conduct field tests to see whether standards are technically feasible, or to make fully informed decisions about risks. See pp. 24-25 & n.7, *supra*. It is hard to believe that Congress would have given to juries a power over boat design that it was unwilling to entrust to state legislatures or agencies, and petitioner's suggestion (Br. 14) that juries and the Coast Guard should "work together" to design safe boats is difficult to take seriously. See *Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means").

Petitioner says that "holding a manufacturer liable for failing to include a *particular* propeller guard on a *particular* boat engine" would not frustrate the Coast Guard's judgment that no "universally acceptable" propeller guard is feasible. Br. 40. Accord U.S. Br. 27. But this reflects a fundamental misunderstanding of the problem. Outboard motors are not custom-made for particular boats; they are made to fit *any* boat with an appropriate horsepower rating. 33 C.F.R. § 183.53. Any guard must be "hydrodynamically and structurally compatible with the intended propulsion unit" and "the hull on which the motor is used." J.A. 38. There are "thousands of hull designs" and "hundreds of propulsion unit[s]," *ibid.*, and manufacturers have no way to know which of the "vast array" of boats will be paired with their motors. J.A. 83. Thus, the question is not whether a "particular" motor should be fitted with a

"particular" propeller guard, but how a guard could be designed that would be compatible with the full range of boats on which it might be used. As the Coast Guard concluded: no "universally acceptable propeller guard is available or technically feasible," and "retrofitting millions of boats would certainly be a major economic consideration." J.A. 80; see *id.* at 83 (citing the "vast array of boat configurations"). Congress carefully drafted this statute to prevent just such effects.

c. The BSA's Ban on Substantial Alterations of Existing Boats. Finally, Congress determined that safety standards should be established and enforced on a prospective basis. The Coast Guard may "not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence." 46 U.S.C. § 4302(c)(3). "The term 'substantial alteration' * * * encompass[es] economic as well as physical considerations," and "great caution [must] be exercised in applying standards to existing boats because of the great burden this can create on both manufacturers and the boating public." S. Rep. at 18-19.[19]

A common law propeller guard requirement would plainly frustrate the BSA's ban on requiring substantial alterations of existing boats. Such a requirement would work a major re-design of the boat motor's drive system. Moreover, tort law inevitably operates retrospectively, and manufacturers would be pressured by tort judgments to modify millions of outboard motors to avoid open-ended civil liability. To allow such design

[19] Petitioner states that the Coast Guard may not compel substantial alterations of existing boats "*unless* the Coast Guard makes a determination that the regulation is necessary to 'avoid a substantial risk of personal injury to the public, that the [agency] considers appropriate in relation to the degree of hazard that the compliance will correct.'" Pet. Br. 5 (emphasis added); accord U.S. Br. 3. That is not what the Act says. It says the Coast Guard may "not compel substantial alteration" of existing boats, "*but subject to that limitation* may require compliance or performance to avoid a substantial risk of personal injury to the public." 46 U.S.C. § 4302(c)(3) (emphasis added). The legislative history confirms that *all* substantial alterations of existing boats are barred. S. Rep. at 18-19.

defect claims would frustrate Congress's purpose of achieving uniform, feasible, economic, prospective safety standards, on the basis of expert judgment.[20]

2. The Coast Guard's decision not to require propeller guards reinforces a finding of conflict preemption.

Finally, as the court below held (Pet. App. 18-19), a common law damages action for failure to install propeller guards is impliedly preempted by the Coast Guard's decision, after 1[illegible] months of study, not to require propeller guards on recreational planing boats. As in *Geier*, the agency here considered the benefits and risks of a single piece of equipment and made a judgment that the purposes of the BSA would best be served if the item was *not* required. 529 U.S. at 881. In cases involving decisions not to regulate, the operative question is whether the failure of "federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved *pursuant to the policy of the statute*." *Ray*, 435 U.S. at 178 (emphasis added).

In *Ray*, the Court invalidated a Washington law that banned large ships from navigating in Puget Sound, where the Coast Guard had authority to regulate vessel size and traffic under Title I of the PWSA. The Coast Guard had not adopted size limitations, instead opting for a traffic rule that prohibited two large ships from passing through the Sound at the same time. Noting that the legislative history stressed "the importance of uniformity of regulation" and "the careful consideration that the Secretary must give to various factors before exercising his authority"—"including the scope and degree of hazard" and the

[20] A jury could not mandate propeller guards without placing manufacturers in violation of Coast Guard regulations. The Coast Guard requires that all boats equipped with outboard motors be "capable of completing a 90° turn without the driver losing control of the boat or reducing the throttle setting" at "maximum throttle." 33 C.F.R. § 183.53. The NBSAC found that boats equipped with ring guards could not pass this test. J.A. 31-32.

"economic impact" of regulation—the Court explained that "it was anticipated that there would be a single decisionmaker, rather than a different one in each State." 435 U.S. at 177. Because the Secretary "exercised his authority in accordance with the statutory directives" and considered the "variety of interests which may be affected by [its] exercise," yet acted in a "narrow" manner, the Court held that his "*failure to promulgate a ban*" on large ships "takes on the character of a ruling that no such regulation is appropriate or approved *pursuant to the policy of the statute*." *Id.* at 178 (emphasis added).

So it is here. The BSA reflects a deep concern for "uniformity" and decisionmaking by a single expert regulator. The Coast Guard followed the BSA's requirements to the letter, directed the NBSAC to engage in comprehensive factfinding concerning propeller guards, and invited public participation. See *supra* pp. 7-8. Its decision—which declined to require propeller guards—was based on the criteria for regulation under the Act. Because the Coast Guard "exercised [its] authority in accordance with the statutory directives," its decision "takes on [a preemptive] character." *Ray*, 435 U.S. at 178.

The contrary claims of petitioner and the Solicitor General are mistaken. *First*, they question whether the Coast Guard's decision was rendered with sufficient formality. See Pet. Br. 36; U.S. Br. 22-26. There is no support for such a requirement in this Court's preemption cases. See *Geier*, 529 U.S. at 884-885. This is particularly clear under the BSA, which expressly preempts all state laws and regulations that are not "identical" to existing federal standards. 46 U.S.C. § 4306. The BSA's preemption provision—unlike that in *Geier*—gives preemptive effect to the *absence* of regulation, which obviously need not be embodied in formal rules.

Second, they claim that the Coast Guard's ruling did not adopt the reasoning of the NBSAC and thus should be seen as agnostic on the subject of propeller guards. Pet. Br. 38-40; U.S. Br. 28-29. But this is a highly implausible post hoc reading of the

Coast Guard's ruling. In refusing to require propeller guards, the Coast Guard's ruling closely tracked the NBSAC's findings and followed the statutory criteria concerning safety regulations to the letter. See J.A. 80 ("All of the report's recommendations are accepted" and "will be implemented"). The letter in which that decision was set forth contains not the slightest suggestion that the Coast Guard took a different view of the relative safety hazards and benefits of propeller guards. Indeed, the Coast Guard cited "the many questions about whether a universally acceptable propeller guard is available or technically feasible" and referred to the "accident data" in the NBSAC's report.[21]

This case, however, does not call for an exhaustive "inquiry into the [agency's] purposes" in refusing to mandate propeller guards. See *CSX*, 507 U.S. at 675. The dispositive question is whether the Coast Guard had unresolved policy concerns of its own—based on the criteria for regulating under the Act—which showed that it would be unwise for manufacturers to be

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[21] The "propeller guard accident data" cited by the Coast Guard *themselves* show that propeller guards increase the risk of injury. Roughly 80 percent of propeller accidents occur at "speeds in excess of 10 miles per hour," and "a skull impact at 10 mph or more in the water would be generally fatal"—"[e]ven with an idealized cushioning material, not currently known to exist." J.A. 25, 33-37. The Subcommittee's finding that propeller guards increase the likelihood of collision with the motor—by increasing the size of the drive system and the risk of blunt trauma injury—thus confirms that *any* guard would increase the risk of fatality in a high percentage of accidents.

Similarly, the Subcommittee found that "it is not practical or feasible to mandate guards for specific uses" and that guards only work for boats that operate at "slow speeds." J.A. 36, 38. The Coast Guard agreed that there are many unresolved questions about whether a "universally acceptable propeller guard is available or technically feasible in all modes of boat operation." J.A. 80. The Subcommittee found that "[a]ny guard would have to be both hydrodynamically and structurally compatible" with both the boat and motor on which it is used, that designing a universal guard was infeasible, and that individualized guards involved "prohibitive cost." J.A. 38. The Coast Guard cited the same problem of feasibility, the "vast array of boat configurations," and the large cost of "retrofitting millions of boats." J.A. 80, 83.

required to install them. The BSA is designed not only to facilitate design requirements that foster safety, but also to ensure that those requirements that *are* imposed are not a risky experiment that could jeopardize public safety. That is why the Coast Guard's ruling explained that "[t]he regulatory process is very structured and stringent regarding justification." J.A. 80.

Contrary to the Solicitor General (at 18), we do not suggest that a federal agency's considered decision not to regulate always has preemptive effect. But when the decision is made on the basis of the findings of a statutorily-constituted expert body —which concluded that a proposed safety device is not feasible and may produce more injuries than it would prevent—and when Congress has affirmatively insisted that state law may not be applied until the expert agency is persuaded to impose an on-point federal rule, it is not realistic to read it any other way. The Coast Guard's decision regarding propeller guards plainly has the character of "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178. Accordingly, it has preemptive effect.

* * * * *

In the end, petitioner provides no answer to the dispositive question of congressional intent: why would Congress direct the Coast Guard to craft a program of uniform federal design standards that meet detailed statutory criteria—while precluding state legislatures and agencies from playing any role even in the absence of a federal standard—yet allow state courts and juries to mandate installation of potentially dangerous equipment that the Coast Guard expressly declined to approve? The incoherence of such a scheme is a convincing rebuttal to petitioner's claims.

CONCLUSION

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

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Miscellaneous:

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Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. Mar. L. & Com. 517 (2001) 18-19

ARGUMENT

In what can only be viewed as a desperate attempt to avoid an adverse ruling on the state-law preemption question presented in this case, Mercury Marine begins its brief with an entirely new argument that was never presented to the lower courts and never raised in its Opposition to the Petition for Certiorari: that this case is governed by federal admiralty law and that petitioner's claims are "statutorily displaced" by the Boat Safety Act. *See* Br. 7-28. Not only did Mercury Marine fail to raise this argument below and in its Opposition, but it affirmatively argued that petitioner's claims are governed by *Illinois state law*. As we explain in section III below, this new argument has been waived and, in any event, it lacks merit. This Court should not entertain respondent's attempt to evade resolution of a preemption question on which this Court has already *twice* granted review. *See Lewis v. Brunswick*, Case No. 97-288, *cert. dismissed*, 523 U.S. 1113 (1998) (case settled after oral argument before any decision was rendered).

At bottom, respondent's strategic decision to rely on a waived issue dramatically underscores the weakness of its arguments regarding the preemption question on which this Court granted review. As we explained in our opening brief, any question of express preemption in this case was effectively resolved by *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000), which construed a savings clause similar to the one at issue here as expressly preserving common-law claims. *See* Pet. Br. 28-33. And any question of implied conflict preemption is laid to rest by the fact that the U.S. Coast Guard has not taken any regulatory action with respect to propeller guards – a conclusion that is supported by the United States' position, both here and in *Lewis*, that common-law no-propeller-guard claims do not conflict with any federal purposes. Respondent and its *amici* struggle mightily to salvage a preemption defense from the ashes of these developments, but their attempts fail at every juncture.

I. Petitioner's Claims Are Not Expressly Preempted.

A. Respondent's main theme regarding express preemption – and, indeed, throughout its entire brief – is that, because the Boat Safety Act expressly preempts the entire field of state positive law even in areas where the Coast Guard has not taken any regulatory action, Congress cannot possibly have intended to preserve common-law claims such as petitioner's. Any such approach, in respondent's view, would be both "absurd" and "incoherent." *See* Br. 41, 49.

Respondent's argument fails on two counts. First, the Act itself does not support Mercury Marine's field preemption theory, as it merely grants the Coast Guard *permissive* authority to promulgate minimum safety standards. *See* 46 U.S.C. § 4302.[1] Second, even if the Act preempts the field of state positive law, it is far from "absurd" for Congress to have chosen to preserve the rights of injury victims to sue at common law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (common-law tort claims yielding jury verdict of over $10 million in compensatory and punitive damages permitted to stand despite Congress' occupation of entire field of nuclear safety). As this Court held in *Silkwood*, although there may be some "tension" between preemption of state positive law and preservation of common-law claims, Congress' decision to adopt such an approach must be respected. *Id.*

B. The Boat Safety Act makes clear, moreover, that this is precisely the approach adopted by Congress with respect to recreational boats. The Act's express preemption clause contains no reference to common-law claims; instead, it merely preempts state "law[s] or regulation[s]" that are not identical to federal regulations. 46 U.S.C. § 4306. Mercury Marine's principal response is that Section 4306 also contains language – particularly the word "requirement" – that this Court has held encompasses common-law claims. Br. 30-32. This argument fails, however, because the Act does not preempt "requirements" at all; rather, it preempts a "law or regulation . . . *imposing* a requirement for associated equipment . . .." 46 U.S.C. § 4306 (emphasis added). Thus, the word "requirement" in the Boat Safety Act is merely used to describe the *type* of "law or regulation" that is preempted by federal law – it is not, as in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and in *Medtronic v. Lohr*, 518 U.S. 470 (1996), intended to designate an entirely separate category that is subject to preemption.[2]

C. This interpretation of Section 4306 is confirmed by the Act's savings clause, which provides that "compliance with this chapter . . . *does not relieve a person from liability at common law or under State law.*" 46 U.S.C. § 4311(g) (emphasis added). In *Geier*, 529 U.S. at 868, this Court construed a

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[1] As previously explained (Pet. Br. 23-24), this fact alone distinguishes this case from the field-preemption holdings of both *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 (1978), and *United States v. Locke*, 529 U.S. 89, 111 (2000). Respondent nonetheless argues that *Ray* supports its field-preemption theory because it "expressly rejected the proposition that Congress's use of 'minimum standards' in an Act . . ." precludes a finding of field preemption. Br. 35. This observation is irrelevant, however, because *Ray*'s field-preemption holding turned on the fact that the statute at issue there – unlike the Boat Safety Act – imposed a *mandatory* duty on the Coast Guard to take regulatory action in the occupied field. *See* 435 U.S. at 168.

[2] *Cipollone*'s holding is also inapposite for a number of reasons previously explained (*see* Pet. Br. 26 n.10), not the least of which is that the federal statute at issue in *Cipollone* did not include any savings clause, let alone one that expressly refers to common-law claims. The same is true of all the other cases cited by respondent in support of its express-preemption argument. *See* Br. 31-32.

similar savings clause in the National Traffic and Motor Vehicle Safety Act (the "MVSA") as expressly preserving common-law claims. Since *Geier*, no court – including the court below – has held that the Boat Safety Act expressly preempts common-law claims. *See* Pet. Br. 21.

Respondent's main argument is that *Geier*'s express-preemption holding does not apply here because the Boat Safety Act's savings clause refers to "State law" as well as common law – a reference that, in Mercury Marine's view, would render Section 4306 a nullity if it were afforded the meaning given by petitioner. Br. 37. This argument, however, rests on a single, incongruous proposition: that because the Act's savings clause is *broader* than that at issue in *Geier*, it should be construed more narrowly. In addition, contrary to respondent's claim, the Act does not contain a reference to the entire body of state law. Rather, it speaks of the circumstances under which "a person" would be "relieve[d]" of "liability at common law or under State law," which clearly refers to forms of *damages liability*, whether pursuant to common law *or* statute (*e.g.*, state product liability statutes or wrongful death statutes).[3] Because the reference to "State law" in the savings clause merely refers to damages liability imposed via statute, state *positive-law* standards are still subject to preemption under Section 4306.[4]

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[3] *See Cipollone*, 505 U.S. at 518, 537 n.2 (referring to statutory language providing that "[n]othing in this Act shall relieve any person from liability at common law or under *State statutory law* to any other person" as preserving damages claims from preemption).

[4] Respondent nonetheless argues (Br. 33) that, because the House Report accompanying the original legislation referenced an intent to "preempt the field of state law," Section 4311(g) cannot plausibly be read to save common-law claims. The savings clause, however, was added as an amendment to the bill *after* the House Report specifically to clarify that "in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability." S.

In fact, it is *respondent's* interpretation of Section 4306 that would effectively "repeal" the savings clause. According to the Senate Report, the savings clause was intended to clarify that "in a product liability suit mere compliance with the minimum standards promulgated under the Act will not be a complete defense to liability." 1991 U.S.C.C.A.N. at 1352. Under Mercury Marine's "field preemption" reading of Section 4306, however, the states would retain almost no power to impose *any* liability on boat manufacturers, since all state law that is "not identical" to a preexisting federal standard would be wiped out by direct operation of Section 4306. In this scenario, there would be no need for manufacturers to assert regulatory compliance as an affirmative defense under state law, because any common-law claims relating to recreational boat design would already be extinguished by the Act's preemption clause. Thus, Mercury Marine's reading of the statute would render the savings clause largely meaningless – an approach this Court has disavowed. *See Geier*, 528 U.S. at 868.[5]

Respondent attempts to salvage its interpretation of Section 4311(g) by arguing that it preserves a "subset of state law and

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Rep., 1991 U.S.C.C.A.N. at 1352. *See generally* Pet. Br. 30-31. Thus, whatever the intent underlying the original House Bill, the subsequent enactment of Section 4311(g) shows that common-law claims were expressly *excluded* from any preempted field.

[5] Respondent also attempts to distinguish *Geier* on the ground that the Boat Safety Act's preemption clause "is far broader" than the one at issue in *Geier* because "preemption under the MVSA is triggered only by promulgation of a federal 'safety standard,'" while the Boat Safety Act's preemption clause applies (at least in the view of respondent) even when there is no federal safety standard in place. Br. 30. This, however, is a distinction without a difference. *Geier* interpreted the MVSA's preemption clause as not including common-law claims because any other approach would have rendered the MVSA's savings clause meaningless. *See* 429 U.S. at 868. The exact same approach is warranted here for the exact same reasons.

common law" that is not otherwise preempted by direct operation of Section 4306 – *i.e.,* claims concerning breach of contractual warranties, negligent boat operation, and defective manufacture and installation of marine products. Br. 39-40. This argument, however, finds no support in the text of the savings clause, which does not distinguish between any forms of liability. It is also contrary to the Act's legislative history, which shows that Congress enacted the savings clause to preserve victims' rights to bring "product liability suits," one primary form of which is design-defect claims. *See* S. Rep., 1991 U.S.C.C.A.N. at 1352.[6] Finally, respondent's argument fails to resurrect any meaningful role for the savings clause, because no reasonable defendant would attempt to rely on its compliance with federal standards governing boat *design* as an absolute defense in lawsuits – such as those alleging breach of warranties, negligent boat operation, or negligent installation of a properly designed product – that have little or nothing to do with the design features of the boat in question.[7]

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[6] Respondent's contention that Congress cannot have intended to preserve design-defect claims because such claims were "far from the usual tort law" (Br. 38) lacks merit. In truth, the Act was passed against the backdrop of existing common-law, which has historically had input on safe product designs, including in the boat safety area. In fact, during a Senate hearing on the Act, the Commandant of the U.S. Coast Guard testified that "[c]ourts have consistently held that a vessel owner's compliance with Coast Guard inspection requirements is not synonymous with 'seaworthiness' under maritime law." Pet. Br. 31 (quoting S. Rep. at 66). Thus, at the time the Act was passed, common law was deemed compatible with federal boat regulation, and this presence was recognized by Congress during the drafting of this legislation.

[7] Equally unconvincing is *amicus* Product Liability Advisory Council's argument (Br. 23-24) that Section 4311(g) plays a "meaningful role" in cases where the Coast Guard has issued an exemption from preemption with respect to one of its design or construction standards or where the State has regulated in order to meet "uniquely hazardous [local] conditions," as the Act permits. This argument fails because, in such cases,

Mercury Marine also argues (Br. 41) that the savings clause cannot mean what it says because, if it did, State legislatures would be powerless to overturn a jury verdict holding a manufacturer liable for not installing propeller guards – an "absurd result," in respondent's view. However, a state law that eliminated a tort cause of action in the boat safety area would not have the effect of "establishing a recreational vessel . . . safety standard or imposing a requirement for associated equipment," and thus would not be preempted by Section 4306. Thus, contrary to respondent's claim, nothing in the Act would stop a State from passing a law that boat manufacturers cannot be held liable for failing to install a propeller guard. And even if it did, a statutory scheme that preempts state legislation while preserving the ability of juries to compensate injury victims is anything but "absurd," especially where the governing statute would otherwise leave victims without any remedy at all. *See Silkwood*, 464 U.S. at 251 ("[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

II. Petitioner's Claims Are Not Impliedly Preempted.

A. Respondent's main theme with regard to implied preemption is that *all* common-law claims – not just those involving propeller guards – necessarily conflict with Congress's goal of achieving "uniformity" with respect to recreational boat design standards. Br. 42-43. This argument, however, is negated by the express terms of the Boat Safety Act itself. As explained above, uniform safety standards may be the goal of Section 4306, but preservation of common-law claims

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Section 4306 would not apply on its face, and thus there would be no need to "save" the claims from the scope of federal preemption. Nor would there be any need to rebut a regulatory compliance defense in such cases, because no defendant would logically argue that it is entirely exempt from liability by virtue of its compliance with *inapplicable* government regulations.

is the goal of Section 4311(g). Congress adopted both sections. Its express preservation of common-law claims must be respected.[8]

Respondent nonetheless insists that common-law claims are preempted because they exert a "regulatory effect" identical to that of state positive law. Br. 44. The effects of common-law tort liability and direct state regulation, however, are far from identical. The principle purpose of a "law or regulation establishing a . . . safety standard or imposing a requirement for associated equipment" is to mandate *conduct*: a violator of a state regulatory requirement is subject to liability per se, to administrative remedies, or even to criminal penalties, and can often be forced to remove noncomplying products from the market. Imposition of tort liability, in contrast, does not force a manufacturer to do anything other than pay damages to its victims. Thus, as this Court has previously recognized, "[t]he effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of such an award provision, [and] *Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*" *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) (emphasis added).[9]

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[8] *See Geier*, 429 U.S. at 35 (the MVSA's "savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims").

[9] *See also Silkwood*, 464 U.S. at 256 (tort awards not preempted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards"); *Cipollone*, 505 U.S. at 518 (noting that "there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (Blackmun, J., concurring).

Despite this authority, respondent argues that Congress cannot have intended – and the Supremacy Clause does not permit – manufacturers to be subject to "widely varying local requirements" with regard to recreational boat design. Br. 43. But this is precisely the outcome that is permitted by numerous statutes, including (for example) the MVSA, which this Court has held does not preempt *any* forms of state law in areas where the federal government has not regulated. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 286, 289-90 (1995). Even when a federal safety standard is in effect, moreover, common-law claims are permitted to go forward so long as the federal standard is merely intended to create a regulatory floor. *See Geier*, 529 U.S. at 870. There is no logical basis for assuming (as does respondent) that choices Congress made with respect to motor vehicles, which are sold nationwide and are routinely used in interstate commerce, cannot possibly have made sense in the case of recreational boats.[10]

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[10] Uniformity aside, respondent also argues that petitioner's lawsuit would "contravene Congress's intent that design standards be imposed only after deliberation by expert administrators applying detailed statutory criteria." Br. 44. This argument, however, proves too much. Myriad other statutes authorize "expert administrators" to create minimum safety standards according to highly specific statutory criteria, *see, e.g.*, 15 U.S.C. § 1193 (Flammable Fabrics Act); 15 U.S.C. §§ 2506-08 (Consumer Product Safety Act); 42 U.S.C. § 5403 (National Manufactured Housing Construction and Safety Standards Act), yet courts have routinely held that minimum safety standards promulgated pursuant to such statutes do not preempt state common-law claims. *See, e.g., Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000) (consumer products); *Choate v. Champion Home Builders Co.*, 222 F.3d 788 (10th Cir. 2000) (housing); *Gryc v. Dayton Hudson Corp.*, 297 N.W.2d 727 (Minn. 1980) (flammable fabrics). *See also Geier*, 529 U.S. at 870. Nor is there any basis for respondent's claim (Br. 46-47) that permitting common-law design-defect claims would undermine Congress's prohibition of federal regulations that would "compel substantial alteration" of existing boats. As previously noted, holding a manufacturer liable for failing to install a propeller guards does not "compel" a manufacturer to do anything other than pay damages to the injury victim.

B. Nor is there any merit to respondent's claim that this lawsuit would conflict with or frustrate the Coast Guard's purposes. *See* Br. 47-50.[11] As previously explained, this argument fails for two reasons: (1) the Coast Guard has never promulgated any regulations with regard to propeller guards; and (2) the Coast Guard has never concluded that propeller guards are contrary to the interests of boat safety. Pet. Br. 38-41; U.S. Br. 15-30.

1. In response, Mercury Marine does not deny that the agency's rulemaking authority is limited to the promulgation of actual safety standards according to the formal rulemaking procedures of the Boat Safety Act. Nor does it deny that, as a matter of basic administrative law, informal agency decisions lack the force and effect of substantive law. *See* Pet. Br. 37; U.S. Br. 22-26. Rather, it argues that, because the Act preempts the field of state positive law even in cases where the Coast Guard has not regulated, no formal rulemaking is required impliedly to preempt common-law claims like petitioner's. Br. 48. But here again, respondent's argument improperly conflates the Act's effect on state positive law with its effect on common-law claims. As explained above, whether or not Congress preempted the field of state positive law, it expressly *excluded* common-law claims from any preempted field. That being so, common-law claims must be permitted to go forward unless they conflict with or undermine federal purposes. *Geier*, 429 U.S. at 875. And, because the Coast Guard chose not to follow the rulemaking procedures mandated by the Act, there is no valid expression of federal "purposes" with which petitioner's claims could possibly conflict. *See* U.S. Br. 22-26.[12]

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[11] Notably, respondent treats as an afterthought the implied-preemption theory on which the lower court decided this case, relegating this argument to the last three pages of its merits brief.

[12] In addition, as the United States observed, because the Boat Safety Act's savings clause makes clear that certain common-law claims can go forward even in areas where the federal government *has* regulated, finding preemption in this case "would thus give *greater* preemptive effect to the Coast Guard's decision *not* to regulate than would result from the agency's decision to promulgate a federal safety standard." U.S. Br. 20 (emphasis in original). Plainly, this would not do.

2. Moreover, contrary to Mercury Marine's contention, the Coast Guard did not conclude that propeller guards are dangerous. The Coast Guard Letter does not mention the supposed hazards of propeller guards; to the contrary, it appears affirmatively to encourage their continued testing and use. *See* Pet. Br. 39-41. Nor does the letter contain any indication of any intention on the part of the agency to preempt common-law claims regarding unguarded boat propellers.[13] And, since 1990 (when the letter was written), the agency has continued to study the possible use of propeller guards in recreational vessels to help prevent propeller-strike accidents. *See* Pet. Br. 11.[14]

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[13] Respondent cites *Geier*, 529 U.S. at 884-85, for the proposition that implied preemption does not require a formal statement of agency intent to preempt. Br. 48. However, *Geier*'s implied-preemption holding was based on a lengthy and complex federal regulation – Motor Vehicle Safety Standard 208 – that exhaustively addressed virtually every aspect of the subject matter at issue (passive restraint systems in passenger cars). *See* 529 U.S. at 875-82. (Even so, four dissenting Justices vigorously argued that the absence of any affirmative statement of an intent to preempt mandated a finding of no preemption. *See* 429 U.S. at 90 (Stevens, J., dissenting)). In this case, in contrast, there is no federal regulation at all governing propeller guards, rendering *Geier* inapplicable on this point.

[14] Respondent argues (Br. 12) that the Coast Guard's post-1990 efforts in this area are irrelevant because they concern non-planing vessels (*i.e.*, houseboats) rather than motor boats like the one that killed petitioner's wife. However, the Coast Guard's Advisory Committee recently recommended that the agency promulgate regulations requiring, among other things, that all new "planing" vessels 12-26 feet in length be required to install one of four possible "propeller injury avoidance measures," including "[p]ropeller guard[s] – any design." Minutes of 67th Meeting of the National Boating Safety Advisory Council (April 23-24, 2001), at 34. (These minutes are available at http://www.uscgboating.org/bul/bul_nbsac.asp.) The Coast

Mercury Marine's response (Br. 49) is that, because the Coast Guard Letter "closely tracked the [Advisory Committee's] findings," the Coast Guard necessarily must have endorsed all the factual conclusions of the Subcommittee Report. This argument, however, lacks any basis in fact. The *only* factual finding repeated in the Coast Guard Letter is the Subcommittee's observation that there is no "universally acceptable propeller guard available or technically feasible in all modes of boat operation." *See* J.A. 80. There is no mention of any of the Subcommittee's statements regarding the alleged dangers of propeller guards. Thus, as the United States explains, "nothing in the [Coast Guard L]etter expressly endorsed [the Subcommittee's] findings or incorporates them by reference." U.S. Br. 29. Against this backdrop, it is impossible to discern the type of "clear evidence of a conflict" that must form the basis of any implied preemption ruling. *Geier*, 529 U.S. at 885.

3. Because there is no factual basis for concluding that the Coast Guard intended to preempt claims like petitioner's, respondent relies on *Ray v. Atlantic Richfield Co.*, 435 U.S 151 (1978), for the proposition that the Coast Guard's affirmative decision not to require propeller guards exerts preemptive force. *See* Br. 48. *Ray*, however, has no bearing on this case, because the agency there had in fact issued comprehensive regulations regarding the subject matter at issue. *See* 435 U.S. at 178; *see also* Pet. Br. 43-44; U.S. Br. 20-22 (distinguishing *Ray*). Respondent's theory, moreover, paints with an overly broad brush, as it would accord preemptive effect to any agency decision to study, but ultimately take no regulatory action with respect to, a particular safety device – even where, as here, the agency has never found the device to be dangerous and never

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Guard has not yet acted on this recommendation, although it has stated that it intends to address it in "subsequent regulatory projects." J.A. 140.

given any indication of an intent to preempt state common-law claims. That cannot and should not be the law.

This conclusion is underscored by the fact that the federal government has *twice* taken the position, both here and in *Lewis*, that no-propeller-guard claims like petitioner's do not conflict with any federal purposes. This Court has recognized that the United States' position on the preemptive effect of agency actions is entitled to at least "some weight." *Geier*, 529 U.S. at 883; *see also id.* at 886 (United States' position in *amicus* brief that federal regulation preempts common-law claims accorded "special weight"). This approach is especially appropriate here because, not only has the United States' position remained "consistent[ ] over time," *Geier*, 529 U.S. at 883, but the Coast Guard is *ceding* authority to the States, not trying to claim power for itself. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (adopting United States' position that breach-of-contract claims are not preempted by Airline Deregulation Act of 1978). Thus, this Court should accord the United States' position the "special weight" it deserves.

III. Respondent's Maritime-Law Argument Is Waived And Lacks Merit.

Finally, at the outset of its brief, respondent devotes nearly one-third of its entire argument to a new issue that was never raised below, was not mentioned in its Opposition to the Petition, and directly contradicts its position in the lower courts: that this case is within federal admiralty jurisdiction and that "federal maritime law cannot possibly be read to impose a federal duty to install propeller guards on motor boats." Br. 19. This argument has been waived and, in any event, lacks merit.

A. Before filing its merits brief in this case, respondent never once suggested that this case is governed by federal maritime

law. In fact, it took the exact *opposite* position before the Illinois Supreme Court, arguing (for over 25 pages of its merits brief) that the Court did not need to reach the preemption question because Mr. Sprietsma's claims lack merit as a matter of *substantive Illinois tort law*.[15] Respondent took the same tack in its Opposition to the Petition for Certiorari, arguing that the preemption issue is not worthy of review because petitioner's claims would fail under *state law*. *See* Opp. 26-27. Despite this consistent litigating position, respondent has made a 180-degree turn and now urges this Court to find that, in fact, this case is subject to *admiralty* jurisdiction and that petitioner's *federal* common-law claims are "displaced" by the Boat Safety Act. Br. 17-28.

Respondent defends this dramatic about-face by arguing that, "[a]lthough this litigation was primarily conducted on the assumption that state law applied, . . . the parties briefed and argued all points necessary to [the] conclusion" that the case falls within federal maritime jurisdiction. Br. 17. This contention is simply false. In truth, *none* of the extensive arguments raised by respondent regarding application of maritime law was ever presented to the lower courts. In fact, respondent's only argument relating to maritime law was in *one paragraph* of its 75-page brief to the Illinois Supreme Court, where it simply argued that petitioner's claims are not entitled to the traditional presumption against preemption of *state law* because this accident occurred on water – an area where "there has been a history of significant federal presence." Br. 36. And respondent never even hinted – let alone actually argued – that petitioner's exclusive remedy lies in admiralty; to the contrary, Mercury Marine agreed that petitioner's claims arise under substantive Illinois tort law, and it attempted to persuade the

[15] Copies of the relevant pleadings from the courts below have been lodged with the Clerk.

lower court to render a decision in its favor on the basis of the alleged weaknesses of petitioner's state-law claims. *Id.* at 49-75.[16]

Even if this Court were prepared to overlook respondent's failure, in clear violation of Rule 15.2 of this Court, to raise its brand-new issue in its brief in opposition, this Court does not address, in any but the most "exceptional cases," questions that a respondent raises here for the first time. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *McGoldrick v. Companie Generale Transatlantique*, 309 U.S. 430, 434 (1940). In this case, there is nothing "exceptional" about the issue respondent raises, given that (1) the lower court undisputably possessed subject matter jurisdiction over this lawsuit, *see Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) (under "savings-to-suitors" clause, state courts are competent to adjudicate maritime cases); and (2) application of federal maritime law in an admiralty case "can be waived." *General Chemical Corp. v. De la Lastra*, 852 S.W.2d 916, 919

[16] Respondent's contention (Br. 19 n.6) that the lower court actually decided "the maritime law question" raised here, and that the court's decision on this point "was a necessary predicate and subsidiary element of its decision" with regard to federal preemption, is also false. In reality, the lower court never found that this case is subject to admiralty jurisdiction; instead, it merely held that, because petitioner's claims "relate to federal maritime activity," this case is not subject to the traditional presumption against preemption. Pet. App. 6. It never held, moreover, that this case is governed by federal maritime law; to the contrary, it held that the *state-law* claims in this case are preempted by the Boat Safety Act. If the lower court had in fact concluded that this case is governed by federal maritime law, then it would not have needed to address the state-law preemption question *at all*. The cases cited by respondent to support review of its waived argument (Br. 19 n.6) have no bearing here, because they all involve situations where the new issue was deemed a "subsidiary question" fairly included in the question presented.

(1993).[17] In addition, respondent's argument that no-propeller-guard claims are governed by federal maritime law has never even been addressed in a single reported decision involving claims like petitioner's. *See* Pet. Br. 22 n.7; Resp. Br. 26. Thus there is no "exceptional" reason for this Court to tolerate respondent's thirteenth-hour attempt to derail this proceeding. *See Steagald v. United States*, 451 U.S. 204, 209 (1981) (a respondent should be barred from raising new issue "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation").[18]

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[17] *See also* David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 La. L. Rev. 685, 703 n.110 (1995) (noting that courts routinely "allow[] parties whose disputes [are] clearly maritime to choose to have the matter governed by state law").

[18] *See also TRW Inc. v. Alexander*, 122 S. Ct. 441, 451 (2001) (refusing to consider new issue raised by respondent for first time in its brief on the merits); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999) ("[w]e would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate"); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999); *Federal Trade Comm'n v. Grolier*, 462 U.S. 19, 23 n.6 (1983); *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 3.20 at 137 (7th ed. 1993).

Finally, we note that, because respondent never argued before the trial court or at the intermediate appellate level that maritime law governed petitioner's claims, any attempt by respondent to have raised its new argument before the Illinois Supreme Court almost certainly would have been rebuffed on state procedural grounds. *See People v. Franklin*, 504 N.E.2d 80, 83 (Ill. 1987) (an appellee is barred from raising a new argument that "is inconsistent with the position adopted below or [where] the party has acquiesced in contrary findings"). This would have constituted an independent and adequate state ground for decision depriving this Court of jurisdiction to consider that issue. *See Michigan v. Tyler*, 436 U.S. 499, 513

B. Respondent's new argument also fails on its merits. As a threshold matter, a party seeking to invoke admiralty jurisdiction over a tort claim must show that (a) the tort occurred on "navigable water"; and (b) that the incident "bears a substantial relationship to traditional maritime activity" *and* has "a potentially disruptive impact on maritime commerce." *Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 532, 534 (1995). The first part of this test is likely not met here because Dale Hollow Lake ("DHL") is a *recreational* lake that apparently does not support any maritime commerce.[19] As for the second part of the jurisdictional test, although "there is no requirement that the maritime activity be an exclusively commercial one," *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982), this Court has insisted that, at the least, an incident involving a pleasure boat must either implicate the "traditional concern that admiralty holds for navigation" (*id.* at 675) or have the potential to disrupt the commercial activities of *other* boats. *Sisson v. Ruby*, 497 U.S. 358 (1990). Neither situation is present here, given that there was no collision with another vessel, *compare Foremost*, 457 U.S. at 675; *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202 (1996), and no possibility that this accident could disrupt the conduct of

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n.7 (1978). Respondent should not be permitted to bootstrap this Court's jurisdiction over its new issue by failing to raise it below altogether.

[19] Although there is no evidence in the record on this point (because respondent has never raised its admiralty argument until now), the Sixth Circuit has held that "[t]he only maritime traffic that occurs on [DHL] is in the form of *pleasure craft*." *Finneseth v. Carter*, 712 F.2d 1041, 1042 (6th Cir. 1983) (emphasis added). Although *Finneseth* went on to hold that DHL is subject to admiralty jurisdiction because it is "susceptible of being used [in the future] as a highway of commerce," *id.* at 1043, the Eighth Circuit has held that admiralty jurisdiction requires a *present* commercial use, not a hypothetical possibility of future commerce. *See Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980). Thus, there is substantial dispute even with respect to the threshold question of whether DHL is subject to admiralty jurisdiction *at all*.

maritime commerce on this purely *recreational* body of water. *Compare Sisson*, 497 U.S. at 363 (finding admiralty jurisdiction where fire on yacht docked at marina "could have spread to nearby commercial vessels or ma[d]e the marina inaccessible to such vessels"). Against this backdrop, it is not surprising that respondent never before even attempted to argue that petitioner's lawsuit was subject to federal admiralty jurisdiction.

Even if this case did fall within admiralty jurisdiction, it would not follow that petitioner's lawsuit is governed by federal maritime law. On this point, respondent simply equates the existence of admiralty jurisdiction with the application of substantive maritime law. *See* Br. 19-20. In reality, the question of what substantive law governs tort cases litigated in admiralty (which was specifically left open in *Yamaha*, 516 U.S. at 216 n.14) remains one of the thorniest and most debated areas in maritime jurisprudence.[20] In the wake of *Yamaha*, however, numerous commentators have persuasively argued that choice-of-law issues in admiralty should be resolved by weighing the relative interests of the state and the federal governments in applying their substantive law to the matter at issue.[21] In this case, which involves a "nonseafarer" and arises

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[20] *See, e.g.*, David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L. J. 81, 83, 90 (1996) (describing subject of federal-state choice of law in maritime cases as "diabolically difficult" and explaining that, since *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court has issued 53 decisions in which state law and federal maritime law came into conflict, and "in 29 of those, state law triumphed over the competing claims of federal maritime law") (footnote omitted)).

[21] *See, e.g.*, Ernest A. Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 343-344 (1999) ("[t]here is no longer anything special about maritime commerce that demands a unique and largely judge-made body of uniform federal law"); Robert Force, *Deconstructing Jensen: Admiralty and*

out of an accident on territorial (and, it appears, purely recreational) waters (*see* n.19, *supra*), the State of Illinois' interest in providing a tort remedy to petitioner outweighs any federal interest in the application of federal maritime law. *See* Brief *Amici Curiae* of the States of Missouri, *et al.*, 12-17. Thus, even if this case lies in admiralty as a *jurisdictional* matter (which it does not), *choice-of-law* principles in the post-*Yamaha* era dictate that petitioner's claims are governed by Illinois state tort law (as respondent has contended all along).[22]

Finally, even if this Court were to conclude that this case is governed by federal maritime law, any federal common-law claims that could be asserted by petitioner would not – as respondent contends – be "displaced" by the Boat Safety Act. *See* Br. 20-25. Not only has this argument never been adopted by any court, but it is directly contrary to the plain language of the Boat Safety Act, which expressly preserves common-law claims. *See* 46 U.S.C. § 4311(g). While it could be argued that this express preservation of victims' rights to sue only preserves claims brought under state common and statutory law, it would have made no sense for Congress simultaneously to have

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Federalism in the Twenty-First Century, 32 J. Mar. L. & Com. 517, 541 (2001).

[22] This conclusion also follows from *Yamaha* itself, which held that the "uniformity concerns" that informed other decisions to apply federal law in the maritime context were of much less significance in the context of a claim by a "nonseafarer" in state territorial waters. 516 U.S. at 215-16. *See also* David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L. J. 81, 101 (1996) (arguing that various aspects of *Yamaha* "unmistakably suggest[ ] that the United States Supreme Court may at some point announce that the governing liability standards in cases like *Yamaha* must come from state law").

extinguished all claims asserted under federal common law.[23] In any event, respondent's "statutory displacement" argument is nothing more than a rehash of its state-law preemption defense (*see* Br. 20-25), and it fails for all the same reasons – not the least of which is that Congress did not give the Coast Guard the authority to preempt (or to "displace") *any* common-law claims, state or federal, simply by writing a letter.

CONCLUSION

The lower court's decision finding preemption of petitioner's state common-law claims should be reversed.

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[23] None of the cases cited by respondent (Br. at 21-22) is to the contrary. In *Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981), this Court found statutory displacement of federal common-law nuisance claims where Congress had occupied the entire field through the establishment of a "comprehensive regulatory program" that governed "every point source discharge." Here, in contrast, Congress has merely granted the Coast Guard permissive authority to promulgate safety standards, and there is no federal regulation at all governing propeller guards. Moreover, unlike *Mobile Oil Co. v. Higgenbotham*, 436 U.S. 618 (1978), and *Dooley v. Korean Airlines Co., Ltd.*, 534 U.S. 116, 122 (1998), which held that certain damages permitted under general maritime law were displaced by a federal statute – the Death on the High Seas Act – that "[spoke] directly to the question" at issue by creating an alternative measure of damages, Congress has neither "spoken" of any intent to displace traditional maritime remedies in the area of recreational boating safety nor has it created any alternative means of recovery for victims of unsafe recreational boats. Thus, unlike in *Mobile Oil* and *Dooley*, finding "statutory displacement" under the circumstances presented here would leave victims like petitioner with *no* damages remedy at all.

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In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED, PETITIONER

v.

MERCURY MARINE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner's state common-law tort action, based on respondent's failure to install a propeller guard on a motorboat, is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. 4301 *et seq.*, or by the decision of the Secretary of Transportation in 1990 to take no regulatory action to require the installation of propeller guards on recreational boats.

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TABLE OF AUTHORITIES

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The Federal Boat Safety Act of 1971, 46 U.S.C. 4301 *et seq.*, authorizes the Secretary of Transportation to promulgate appropriate federal safety standards for recreational boats. 46 U.S.C. 4302(a). This case concerns the preemptive effect of the Secretary's decision in 1990 not to require the installation of propeller guards on engine propellers. In *Lewis* v. *Brunswick Corp.*, cert. granted, 522 U.S. 978 (1997) (No. 97-288), which presented the same preemption question, the United States filed a brief amicus curiae taking the position that the Secretary's 1990 decision did not preempt a private tort suit based on a manufacturer's failure to install a propeller guard. The writ of certiorari in *Lewis* was dismissed after oral argument pursuant to settlement. See 523 U.S. 1113 (1998).

STATEMENT

1. a. For most of the last century, Congress sought to promote the safe use of motorboats through various statutory requirements. In 1910, Congress required motorboats

of specified sizes to carry lights and safety equipment. See Act of June 9, 1910, ch. 268, 36 Stat. 462. The purpose of that law was to "prevent[ ] collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States." H.R. Rep. No. 1162, 61st Cong., 2d Sess. 1 (1910). In 1940, Congress acted to expand the definition of "motorboat," to provide for local inspectors to ensure compliance with equipment and design requirements, and to impose penalties on persons who operated motorboats in a reckless or negligent manner. Act of Apr. 25, 1940, ch. 155, 54 Stat. 163; see S. Rep. No. 676, 76th Cong., 1st Sess. (1939). In 1958, Congress declared it "to be the policy of Congress to encourage uniformity of boating laws, rules, and regulations as among the several States and the Federal Government to the fullest extent practicable, subject to reasonable exceptions arising out of local conditions." Federal Boating Act of 1958, Pub. L. No. 85-911, § 9, 72 Stat. 1757.

By the early 1970s, approximately 40 million Americans were engaging in recreational boating activities each year in approximately nine million boats. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). That widespread participation came at a cost, as nearly 7000 persons lost their lives in boating accidents during the years 1966-1970. *Id.* at 7. In response to those developments, Congress enacted the Federal Boat Safety Act of 1971 (FBSA), Pub. L. No. 92-75, 85 Stat. 213 (46 U.S.C. 4301 *et seq.*). The Act was intended "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating—presently the Secretary of Transportation." S. Rep. No. 248, *supra*, at 6.

The FBSA authorizes the Secretary of Transportation to prescribe regulations establishing "minimum safety standards" for recreational boats. 46 U.S.C. 4302. In promulgating regulations, the Act requires the Secretary to consider "the extent to which the regulations will contribute to recreational vessel safety." 46 U.S.C. 4302(c)(1). The Secretary may not establish regulations compelling substantial alterations of existing boats and associated equipment unless compliance would "avoid a substantial risk of personal injury to the public." 46 U.S.C. 4302(c)(3). Before promulgating a regulation, the Secretary must consult with the National Boating Safety Advisory Council (Advisory Council), 46 U.S.C. 4302(c)(4), and must comply with the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553. See S. Rep. No. 248, *supra*, at 19. The Advisory Council must consist of 21 members, equally divided among representatives of "State officials responsible for State boating safety programs," "recreational vessel manufacturers and associated equipment manufacturers," and "national recreational boating organizations and * * * the general public." 46 U.S.C. 13110(b)(1)(A)-(C). The Secretary has delegated to the Coast Guard his rulemaking authority under the FBSA. See 49 C.F.R. 1.46(n)(1).[1]

b. Two provisions of the FBSA speak to the question whether, and under what circumstances, the Coast Guard's regulatory actions under the FBSA will preempt the appli-

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[1] The Coast Guard has promulgated numerous regulations regarding boat safety, specifying equipment to be carried on boats, and mandating design standards for minimum safety requirements. Those regulations address a range of different topics, including vessel numbering and accident reporting, 33 C.F.R. Pts. 173, 174; requirements for safety equipment to be carried on boats, such as personal flotation and visual distress signal devices, *id.* Pt. 175; measures to correct especially hazardous conditions, *id.* Pt. 177; defect notification requirements, *id.* Pt. 179; requirements for manufacturers concerning certifications of compliance, identification of boats, and instructions for personal flotation devices, *id.* Pt. 181; requirements regarding safe boat capacity and flotation devices, and standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, *id.* Pt. 183; and vessel identification requirements, *id.* Pt. 187.

cation of state law. Section 4306 of Title 46, entitled "Federal preemption," provides:

> Unless permitted by the Secretary * * *, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed [by the Coast Guard] under section 4302 of this title.

46 U.S.C. 4306; see S. Rep. No. 248, *supra*, at 14 ("The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."). The Act also contains a saving clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. 4311(g); see S. Rep. No. 248, *supra*, at 32 ("The purpose of [Section 4311(g)] is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.").

c. This case presents the question whether the Coast Guard's decision in 1990 *not* to promulgate a regulation requiring manufacturers to install propeller guards on recreational motorboats preempts a state common-law suit premised on the theory that the manufacturer's failure to install such a guard rendered the vessel unreasonably dangerous. In 1988, the Coast Guard requested the Advisory Council to examine the feasibility and safety advantages and disadvantages of requiring propeller guards on recreational boats. See J.A. 12. The Council appointed a Propeller Guard Subcommittee for that purpose. *Ibid.* After an extensive review of scientific data and testimony, the Subcommittee

determined that the incidence of injuries or fatalities caused by persons coming into contact with propellers was relatively small. See J.A. 24, 39. The Subcommittee also found that propeller guards adversely affect the operation of boats at certain speeds and that such devices could create additional and more severe hazards. J.A. 36-37. The Subcommittee further concluded:

> Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost.

J.A. 38. The Subcommittee made six recommendations to address the issue of propeller strike injuries, including a recommendation that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 40. The Advisory Council accepted the report and adopted its recommendations. J.A. 72-79.

The Coast Guard reviewed the Advisory Council's report and accepted its recommendation that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards," as well as recommendations made by the Advisory Council with respect to other boat safety issues. Pet. App. 40. That decision on behalf of the Coast Guard was communicated to the Advisory Council's Chairman by letter dated February 1, 1990, from Rear Admiral Robert T. Nelson, the Coast Guard Chief of the Office of Navigation Safety and Waterway Services, the office within the Coast Guard having responsibility for recreational boat safety. *Id.* at 40-44. That letter explained (*id.* at 40-41):

> The regulatory process is very structured and stringent regarding justification. Available propeller guard acci-

dent data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

The Coast Guard has continued to study various proposals to lessen the incidence of propeller-related injuries. In 1995, the Coast Guard issued an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on "the public's present feelings about the use of propeller guards or possible alternatives to propeller guards." 60 Fed. Reg. 25,191. In 1996, the Coast Guard issued an ANPRM "to gather current, specific, and accurate information about the injuries involving propeller strikes and rented boats." 61 Fed. Reg. 13,123. In 1997, the Coast Guard sought "comments on the effectiveness of specific devices and interventions which have been suggested for reducing the number of recreational boating accidents involving rented power boats in which individuals are injured by the propeller." 62 Fed. Reg. 22,991. The Coast Guard subsequently extended the period for comments. See *id.* at 44,507.

Following an April 2001 meeting of an Advisory Council subcommittee, the Council recommended that the Coast Guard develop four specific regulations that would: (1) "[r]equire owners of all propeller driven vessels 12 feet in length and longer with propellers aft of the transom to display propeller warning labels and to employ an emergency cut-off switch, where installed"; (2) "[r]equire manufacturers and importers of new planing vessels 12 feet to 26 feet in length with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods"; (3) "[r]equire manufacturers and importers of new non-planing vessels 12 feet in length and longer with propellers aft of the transom to select and install one of several factory installed propeller injury avoidance methods"; and (4) "[r]equire owners of all non-planing rental boats with propellers aft of the transom to install either a jet propulsion system or a propeller guard or all of several propeller injury avoidance measures." 66 Fed. Reg. 63,647 (2001).

On December 10, 2001, the Coast Guard published a Notice of Proposed Rulemaking (NPRM) (66 Fed. Reg. at 63,645-63,650) that "focus[ed] on implementing the fourth [Advisory Council] recommendation." *Id.* at 63,647. The proposed rule, if ultimately adopted, would require owners of non-planing houseboats for rent to "equip their vessels with either a propeller guard, or a combination of three propeller injury avoidance measures: A swim ladder interlock, an aft visibility device, and an emergency ignition cut-off switch." *Ibid.* Owners of non-planing houseboats not for rent would be required to "equip their vessels with either a propeller guard, or [with both] * * * a swim ladder interlock and an aft visibility device." *Ibid.* The December 10 NPRM did not address the Advisory Council's recommendations concerning planing vessels (such as the motorboat involved in this case). The NPRM did state, however, that the Coast Guard would address those recommendations "in subsequent regulatory projects." *Id.* at 63,647.

2. Petitioner Rex Sprietsma sued respondent Mercury Marine in state court to recover damages for the death of his wife, who fell from a motorboat and was struck by a Mercury Marine engine propeller. Petitioner's complaint alleged that

the Mercury Marine motor was defective because it lacked a propeller guard. See J.A. 104, 107, 109-110. The Illinois trial court granted respondent's motion to dismiss, finding that petitioner's claims are impliedly preempted under the FBSA. See Pet. App. 24, 39. The state appellate court affirmed, holding that 46 U.S.C. 4306 expressly preempts petitioner's common-law suit. Pet. App. 23-38.

3. The Supreme Court of Illinois affirmed. Pet. App. 1-22.

a. The court rejected respondent's contention that petitioner's common-law cause of action is expressly preempted by 46 U.S.C. 4306. Pet. App. 7-9. Relying on this Court's intervening decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000), the court held that the inclusion of the saving clause in 46 U.S.C. 4311(g) "prohibits a broad reading of the express preemption provision." Pet. App. 9.

b. The Illinois Supreme Court held, however, that petitioner's common-law suit is impliedly preempted because it conflicts with the Coast Guard's decision not to impose a propeller guard requirement. Pet. App. 10-20. The court observed that in some instances, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Id.* at 13 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Relying on this Court's decisions in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), and *United States* v. *Locke*, 529 U.S. 89 (2000), the court characterized "the relevant inquiry for * * * pre-emption as whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all." Pet. App. 15 (quoting *Locke*, 529 U.S. at 110). The court concluded that petitioner's claims are preempted because "[t]he Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee." *Id.* at 15-16.

c. Chief Justice Harrison dissented, Pet. App. 20-22, relying on the FBSA's saving clause, 46 U.S.C. 4311(g), which provides that compliance with the Act or standards promulgated thereunder "does not relieve a person from liability at common law or under State law." Chief Justice Harrison would have held that, under the "plain and ordinary meaning" of that provision, "[respondent's] compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by [petitioner] in this case." Pet. App. 22.

SUMMARY OF ARGUMENT

A. The Federal Boat Safety Act does not expressly preempt petitioner's common-law claims. The Act categorically preempts state prescriptive laws and regulations establishing recreational vessel performance and safety standards unless they are authorized by the Secretary or are identical to an existing federal standard. The FBSA contains a saving clause, however, that expressly preserves the availability of common-law actions. The saving clause makes clear that petitioner's suit is not foreclosed either by the Act's express preemption provision or by principles of field preemption.

B. Petitioner's suit also is not foreclosed by implied conflict preemption principles. The fact that the Coast Guard focused upon the issue and made a considered decision not to take regulatory action to require propeller guards in 1990 does not, in and of itself, give rise to an inference that state law is preempted.

Respondent contends that imposition of common-law damages liability in this case would be inconsistent with the Coast Guard's *reasons* for declining to adopt a propeller

guard requirement. That argument lacks merit. The 1990 Coast Guard letter did not purport to interpret or explain any preexisting agency action having the force of law and did not itself possess the formal characteristics of an agency action with binding legal effect. In addition, imposition of common-law tort liability based on a manufacturer's failure to install propeller guards would not be incompatible with any decision or policy judgment set forth in that letter. Respondent's argument on this point presumes that, in adopting the bottom-line recommendation of the Advisory Council, the Coast Guard necessarily or presumptively endorsed all the subsidiary findings contained in the Propeller Guard Subcommittee's report. No principle of law justifies that conclusion.

ARGUMENT

PETITIONER'S CLAIMS ARE NOT PREEMPTED BY EITHER THE FEDERAL BOAT SAFETY ACT OR THE COAST GUARD'S DECISION IN 1990 NOT TO PROMULGATE A REGULATION REQUIRING PROPELLER GUARDS

Under this Court's settled preemption jurisprudence, state law is preempted "in three circumstances." *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). "First, Congress can define explicitly the extent to which its enactments preempt state law." *Ibid.* "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. "Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

Ibid. (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Illinois Supreme Court correctly held that petitioner's claims are not expressly preempted by the FBSA. The court erred, however, in holding that those claims are impliedly preempted by the Coast Guard's decision in 1990 not to promulgate a regulation requiring propeller guards.

A. The FBSA Does Not Expressly Preempt Petitioner's Common-Law Claims, And The Federal Government Has Not Occupied The Field Of Motorboat Safety Regulation To The Exclusion Of State Tort Actions

1. The FBSA's preemption provision, 43 U.S.C. 4306, states as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * that is not identical to a regulation prescribed under section 4302 of this title.

Section 4302 states in pertinent part that "[t]he Secretary may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment." 46 U.S.C. 4302(a)(1). The Coast Guard's longstanding position is that, unless and until the agency has promulgated a safety standard dealing with a particular matter, a state law or regulation establishing a safety standard addressing that same matter is preempted, since in the absence of a federally-promulgated standard, such state laws and regulations cannot be "identical to a regulation prescribed under section 4302 of" Title 46. 46 U.S.C. 4306; see Gov't Br. at 14-15, 16 n.8, *Lewis*, *supra* (No. 97-288). Under that interpretation, which comports with the plain language of the Act's preemption provision, the Coast Guard's

failure to promulgate a propeller guard requirement categorically precludes the States from adopting such a requirement by statute or regulation. That is so, moreover, regardless of the Coast Guard's rationale for declining to impose any federal propeller-guard standard.

2. In the instant case, the Illinois appellate court found petitioner's common-law claims to be expressly preempted by Section 4306. Pet. App. 33-34. As the Supreme Court of Illinois correctly recognized (*id.* at 9), however, that reading of Section 4306 is inconsistent with this Court's intervening decision in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000). The Court in *Geier* concluded that the express preemption provision of the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), 15 U.S.C. 1392(d) (1988)—a provision similar to that contained in the FBSA, compare *Geier*, 529 U.S. at 867, with 46 U.S.C. 4306—did not preempt a state common-law cause of action. The Court in *Geier* relied on the NTMVSA's "saving clause," which stated that "'[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.'" *Geier*, 529 U.S. at 868 (quoting 15 U.S.C. 1397(k) (1988)). The Court explained (*ibid.*):

> The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate—for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. * * * The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

The same analysis applies here. The FBSA contains a saving clause providing that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. 4311(g).[2] Section 4311(g) "assumes that there are some significant number of common-law liability cases to save." *Geier*, 529 U.S. at 868. In light of the saving clause, a "broad reading" of Section 4306 as encompassing common-law tort actions "cannot be correct." *Ibid.* Based on this Court's decision in *Geier*, the Illinois Supreme Court correctly held that the FBSA does not expressly preempt petitioner's common-law claims. Pet. App. 9.[3]

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[2] The NTMVSA saving clause at issue in *Geier* provided that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k) (1988). The principal difference between that provision and the FBSA saving clause is that 46 U.S.C. 4311(g) states that compliance with federal standards "does not relieve a person from liability at common law *or under State law*" (emphasis added). Read in context, Section 4311(g)'s reference to "liability * * * under State law" is best understood to refer to state statutes (*e.g.*, wrongful death statutes) that authorize private suits for money damages, but not as a reference to state prescriptive laws and regulations, which are addressed directly in Section 4306. *Cf. Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (characterizing saving clause of the Comprehensive Smokeless Tobacco Health Education Act of 1986, which provides that "[n]othing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person," 15 U.S.C. 4406(c), as "preserv[ing] state-law damages actions").

[3] The FBSA's saving clause reinforces the most natural reading of the preemption provision itself. By its terms, Section 4306 preempts the States from establishing or enforcing "a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment." 46 U.S.C. 4306. Those terms are best understood to refer to a standard prescribed in advance by legislative or administrative authorities. That is particularly so in light of the fact that the FBSA also uses the term "standards" to describe the "regulations" issued by the Secretary, which are pre-

3. The FBSA's saving clause, construed in light of *Geier*, also means that petitioner's common-law damages claims are not foreclosed by principles of "field pre-emption." *English*, 496 U.S. at 79. The subject of recreational boating safety is not "a field that Congress intended the Federal Government to occupy exclusively." *Ibid.* To the contrary, while the States are largely precluded by Section 4306 from addressing that subject through positive laws and regulations, Section 4311(g) expressly contemplates the prospect of state common-law actions.

Indeed, even when the Coast Guard has focused its attention on a particular matter, has undertaken notice-and-comment rulemaking, and has promulgated a federal safety standard, Section 4311(g) means that a defendant's compliance with that standard will not necessarily preclude the possibility of a damages award in a common-law action. The Court in *Geier* observed that its interpretation of the NTMVSA's preemption and saving clauses would "leav[e] adequate room for state tort law to operate" by permitting common-law actions to go forward in those circumstances "where federal law creates only a floor, *i.e.*, a minimum safety standard." 529 U.S. at 868; see *ibid.* (rejecting a "broad reading" of the NTMVSA's preemption clause as "pre-empt[ing] all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard"); *id.* at 870 (saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor"); *id.* at 871 ("the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while

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scriptive in nature and do not encompass common-law or other damages liability. See 46 U.S.C. 4302.

simultaneously providing necessary compensation to victims").

The FBSA's saving clause similarly means that a defendant may be held liable under state tort law notwithstanding its "[c]ompliance with [the Act] or standards, regulations, or orders prescribed under" the Act. 46 U.S.C. 4311(g). The saving clause thus reflects Congress's intent that a state common-law rule should be subject to a less restrictive rule of preemption than applies to a state "law or regulation establishing a recreational vessel or associated equipment performance or other safety standard," which is categorically preempted unless it is either (a) expressly authorized by the Coast Guard, or (b) "identical" to an existing federal standard. 46 U.S.C. 4306; see pp. 11-12, *supra*.

B. The Coast Guard's Decision In 1990 Not To Require Propeller Guards Does Not Impliedly Preempt State Tort Claims Based On The Theory That The Manufacturer Should Have Installed A Propeller Guard

As the Court recognized in *Geier*, imposition of tort liability, like the application of state positive law, will in some circumstances hinder the achievement of federal objectives. See 529 U.S. at 881-883. The Court in *Geier* made clear that, notwithstanding the existence of the FBSA's saving clause, state common-law rules are preempted insofar as they "'actually conflict' with the statute or federal standards promulgated thereunder." *Id.* at 869; see *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) ("neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles'") (quoting *Geier*, 529 U.S. at 869). Under ordinary conflict preemption principles, "implied conflict pre-emption" occurs "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).[4]

As the Illinois Supreme Court recognized, in some circumstances "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Pet. App. 13 (quoting *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)); see *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation.") (ellipsis and internal quotation marks omitted). Respondent argues, and the state court held, that this is such a case—that imposition of common-law liability for failure to install propeller guards is contrary to federal policy as reflected in the Coast Guard's decision in 1990 to take no regulatory action to require propeller guards and is therefore preempted. However, while the Coast Guard has unquestioned authority under the FBSA to take action that would impliedly preempt common-law liability for failure to install a propeller guard, the agency has not done so to date.

1. The Illinois Supreme Court concluded that:

> the Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA. The Coast Guard made an informed decision that no regulatory action should be taken to require propeller guards after studying the findings and recommendations of the Advisory Council and the Propeller Guard Subcommittee. A damage award would, in effect, create a propeller guard requirement, thus frustrating the objectives of Congress in promulgating the FBSA.

Pet. App. 15-16. The state court thus appears to have assumed that a federal agency's considered decision *not* to regulate a particular subject matter necessarily or at least presumptively implies that the matter should not be subject to regulation at either the state or federal level. See *ibid.* (Illinois Supreme Court states that common-law damages award in this setting "would effectively require boat manufacturers to install propeller guards, in direct contravention to the Coast Guard's policy against mandating such a device in favor of affording manufacture[r]s flexibility in the matter") (quoting *Lady* v. *Neal Glaser Marine, Inc.*, 228 F.3d 598, 607 (5th Cir. 2000), cert. denied, 532 U.S. 941 (2001)).

That analysis is misconceived, particularly in light of the FBSA's saving clause. Even where a federal agency has focused its attention on a particular subject matter within its jurisdiction, it may have various reasons for concluding that federal regulation is inappropriate. The agency may believe that the available evidence is too inconclusive to warrant the imposition of a prescriptive standard under the criteria set forth in the relevant federal statute. It may conclude that a particular problem resists a nationwide solution and is better addressed at the state level. Or it may find that variations within the relevant subject matter are such that a workable prescriptive rule of general applicability cannot feasibly be adopted. In none of those circumstances would imposition of state common-law liability on a case-by-case basis subvert any federal policy reflected in the agency's decision to forgo

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[4] Implied conflict preemption also occurs "where it is 'impossible for a private party to comply with both state and federal requirements.'" *Freightliner*, 514 U.S. at 287 (quoting *English*, 496 U.S. at 79). Because the Coast Guard has not promulgated any standard concerning propeller guards, however, it clearly would be possible for respondent to comply both with federal law and with any rule of liability that the Illinois courts might ultimately pronounce.

regulation. Indeed, the existence of potential common-law damages liability under state law may complement the agency's decision by creating an incentive for responsible parties in the private sector to address the problem through private research and innovation, in addition to affording compensation to individual injured parties in appropriate circumstances.

In *some* cases, an agency may conclude that a particular matter is better left unregulated and free of any legal consequences at both the federal and state levels. Where such an intent can reliably be ascertained, state laws may be preempted. See *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation authorizing though not requiring federal savings and loans to utilize and enforce due-on-sale clauses was intended to protect the lender's "flexibility" and therefore preempted state laws forbidding enforcement of such clauses); cf. *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608, 614-615 (1986) (under the National Labor Relations Act, "certain areas intentionally have been left to be controlled by the free play of economic forces," and "States are therefore prohibited from imposing additional restrictions on economic weapons of self-help") (internal quotation marks omitted). But the mere fact that the agency has made a considered decision to forgo *federal* regulation does not, in and of itself, give rise to an inference that all *state* law on the subject—including state tort law—is meant to be preempted.[5]

[5] The report of the Advisory Council's Propeller Guard Subcommittee noted that "[a] number of law suits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." J.A. 17; see J.A. 15-16 (explaining that several persons who testified before the Subcommittee had participated in such lawsuits as witnesses or attorneys); J.A. 17-20 (describing claims and defenses in the litigation). Yet while the Subcommittee recommended against adoption of a federal propeller guard requirement, it did not recommend that the Coast Guard take any action to preempt state common law, nor did it give any indication that it believed private damages actions like those it discussed would be preempted if the Coast Guard accepted its recommendation to take no regulatory action to impose a federal propeller guard requirement. See J.A. 39-41.

Nothing in *Geier* is to the contrary. The Court in *Geier* considered the preemptive effect, not of an agency's failure to regulate, but of an existing federal safety standard that addressed in some detail the subject of motor vehicle passive restraint devices. See 529 U.S. at 878-879. In holding that the plaintiffs' common-law claims were preempted, moreover, the Court stressed that the agency in promulgating the federal standard had "deliberately sought variety—a mix of several different passive restraint systems," *id.* at 878, for safety-related reasons, and had "deliberately provided the manufacturer with a range of choices among different passive restraint devices," *id.* at 875. The Court found that the plaintiffs' lawsuit, which sought to impose a duty on manufacturers to install airbags rather than alternative passive restraint systems, "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. The Court's resolution of the preemption issue thus turned on the agency's affirmative intent, embodied in a formal safety standard, that a mix of passive restraint devices be made available by manufacturers, and on the obstacle to the achievement of that purpose that would be created by a common-law rule requiring the installation of a single such device (airbags).

Geier does not suggest that common-law suits will be preempted whenever the federal agency has focused its attention upon the particular aspect of motor vehicle (or recreational vessel) performance that forms the basis of the plaintiff's claim. To the contrary, the Court in *Geier* recognized that a federal "minimum safety standard"— which obviously reflects the agency's considered decision regarding

the appropriate level of federal regulation—will not categorically preempt "nonidentical state standards established in tort actions covering the same aspect of performance." 529 U.S. at 868; see p. 14-15, *supra*. The *Geier* Court based its preemption holding not on a per se rule, but on a careful analysis of the pertinent safety standard and the extent to which common-law liability would frustrate the purposes embodied in that standard. The Illinois Supreme Court's analysis—which appears to hold petitioner's damages claims to be preempted solely on the ground that "[t]he Coast Guard [had] made an informed decision that no regulatory action should be taken to require propeller guards," Pet. App. 16—would thus give *greater* preemptive effect to the Coast Guard's decision *not* to regulate than would result from the agency's decision to promulgate a federal safety standard. Nothing in *Geier*, or in any other decision of this Court, supports that approach to preemption.

In holding that petitioner's claims were impliedly preempted, the Illinois Supreme Court relied in part on this Court's decision in *Ray*. In *Ray*, the Court found that the State of Washington's oil tanker design requirements were preempted by the federal Ports and Waterways Safety Act of 1972 (PWSA) because the State's design requirements "would at least frustrate * * * the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." Pet. App. 14 (quoting *Ray*, 435 U.S. at 165). As this Court explained in *Locke*, however, that statement addressed the portion of the PWSA governed by field-preemption rules, which apply when "Congress has left no room for state regulation of [the subject] matters." *Locke*, 529 U.S. at 111. The PWSA *required* the Secretary to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." 435 U.S. at 161. The Court relied in part on the existence of that mandatory duty, see *id.* at 165

(noting that "the Secretary must issue all design and construction regulations that he deems necessary for [vessel safety and environmental protection]"), in discerning an "evident congressional intention to establish a uniform federal regime controlling the design of oil tankers," *ibid.* The FBSA, by contrast, does not require the Secretary to issue regulations but simply permits him to do so, and it does not address design features of covered vessels in the comprehensive manner addressed in the PWSA. Compare 46 U.S.C. 4302 (Secretary "may prescribe regulations establishing minimum safety standards" and "requiring the installation, carrying, or use of associated equipment"), with 46 U.S.C. 3703(a) (Secretary "shall prescribe regulations for the design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels") (recodification of former 46 U.S.C. 391a(3)).[6]

Most significantly, *Ray* involved preemption of state prescriptive rules rather than of common-law damages claims,

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[6] This Court in *Ray* also found preempted Washington State's law banning tankers in excess of 125,000 DWT (dead weight tons) from Puget Sound. *Ray*, 435 U.S. at 178; see Pet. App. 14-15. But the Secretary of Transportation, through the Coast Guard, had promulgated the "Puget Sound Vessel Traffic System containing general rules, communication rules, vessel movement reporting requirements, a traffic separation scheme, special rules for ship movement in Rosario Strait, descriptions and geographic coordinates of the separation zones and traffic lanes, and a specification for precautionary areas and reporting points." *Id.* at 170. A local Coast Guard rule prohibited the passage of more than one 70,000 DWT vessel in Rosario Strait in either direction at a given time, and in bad weather, the restriction was reduced to 40,000 DWT. *Id.* at 171. Here, however, the Coast Guard has not issued comprehensive regulations governing motorboat safety generally or the use of propeller guards in particular. The Coast Guard's failure to promulgate a regulation requiring or prohibiting the use of propeller guards on motorboats therefore does not "take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178 (internal quotation marks omitted).

and it did not involve the application of a saving clause. Under the FBSA, by contrast, compliance with federal safety standards does not by itself preclude the imposition of liability under state common law, even where liability is premised on the particular aspect of vessel performance that the federal standard addresses. "[T]he saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." *Geier*, 529 U.S. at 871 (discussing NTMVSA saving clause). *Ray* is therefore of little assistance in resolving the preemption question presented here.

2. As explained above, the fact that the Coast Guard made a considered decision not to promulgate a federal propeller guard requirement is not, in and of itself, a sufficient basis for finding petitioner's state common-law claims to be preempted. Respondent contends, however, that the Coast Guard's *reasons* for declining to adopt such a requirement reflect an agency policy judgment that would be subverted by imposition of state common-law liability based on a manufacturer's failure to install a propeller guard on a recreational vessel. Respondent asserts that the Coast Guard's "decision not to require [propeller guards] reflected not indifference, but a thorough analysis of the regulatory issues and a conclusion that [propeller guards] were technologically infeasible, economically unjustified, and likely to *increase* safety hazards." Br. in Opp. 26. The 1990 Coast Guard letter cannot bear the weight respondent attaches to it. In neither form nor content does that letter "take[] on the character" of a formal "ruling" by the Coast Guard that preempts state tort law. *Ray*, 435 U.S. at 178.

a. The Supremacy Clause provides that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. As the text of the Clause makes clear, preemption of state law may be accomplished only by valid federal *law*. See, *e.g.*, *English*, 496 U.S. at 79 ("state law is pre-empted to the extent that it actually conflicts with federal law"). "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

Federal agency action having the force of law may preempt inconsistent state requirements, just as a federal statute may. See, *e.g.*, *De La Cuesta*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes."); *Ray*, 435 U.S. at 171, 173-178 (local Coast Guard rule adopted by district commander or port captain pursuant to delegated authority); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 962-967 (1986) (federally prescribed rate); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 327 (1981) (adjudicatory order). State law may also be preempted by a federal agency's "inaction joined with action." *Isla Petroleum*, 485 U.S. at 503; see, *e.g.*, *Ray*, 435 U.S. at 174-175, 178. But at least as a general matter, state law is not preempted by a mere expression of an opinion or statement of policy by a federal agency, untethered to any agency action that has legal effect in its own right.

The 1990 Coast Guard letter on which respondent relies does not have the characteristics of agency action having independent legal effect. First, the letter does not purport to represent an interpretation by the Coast Guard of some

other, preexisting agency action having the force of law, to which preemptive effect might now be given in light of an interpretation in the Coast Guard's letter. For example, although the Coast Guard has promulgated federal safety standards dealing with a number of aspects of recreational vessel performance (see note 1, *supra*), the 1990 letter does not purport to be an explication of that existing regulatory framework as leaving no room for a propeller guard requirement. The letter therefore does not describe a "comprehensive federal scheme [that] intentionally leaves a portion of the regulated field without controls." *Isla Petroleum*, 485 U.S. at 503.

Any preemptive effect in this case therefore would have to come from the Coast Guard's 1990 letter standing alone. That letter, however, was not issued in the form of a rule or regulation promulgated pursuant to the procedures—*i.e.*, notice-and-comment rulemaking—that the Coast Guard is legally obligated to employ when it exercises its authority under the Act to promulgate a safety standard "meeting the need for recreational vessel safety." See 46 U.S.C. 4302(a)(1)(A); 5 U.S.C. 553; S. Rep. No. 248, *supra*, at 19. The letter likewise was not a formal public pronouncement issued at the conclusion of a notice-and-comment rulemaking proceeding (and on the basis of the record and comments in that proceeding) stating that no federal safety standard requiring propeller guards would be adopted and that a propeller guard requirement of any sort would undermine boating safety. Compare *Freightliner*, 514 U.S. at 286-287. Rather, the letter followed consultation only with the Advisory Council and simply stated the agency's determination not to institute any such rulemaking proceedings at all. Nor did the letter take the form of a decision issued at the conclusion of some other type of agency proceeding, such as a formal or informal adjudication.

Furthermore, the letter was not published in the *Federal Register* or in any other generally available reference source. Indeed, it was not formally announced in any manner or affirmatively made available even to the parties—*e.g.*, States, manufacturers, and members of the boating public—who might be interested in the subject of propeller guards, including any possible preemptive effect that the agency's approach to the propeller guard problem might be claimed to have. The letter was instead addressed solely to the Chairman of the Advisory Council.[7] Consistent with the context in which it was written, the letter did not set forth any extensive independent evaluation of data or comments of the sort that might be expected if the agency was rendering a decision that was to have independent legal effect on States and private parties—beyond the mere expression of an intent not to institute a rulemaking proceeding to impose a federal propeller guard requirement.

Because the Coast Guard's 1990 letter had none of the foregoing indicia of an agency determination that has (or was intended to have) the force of law in its own right, there is no

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[7] The FBSA does provide that, in prescribing regulations establishing safety standards, the Coast Guard shall "consult" with the Advisory Council about the various considerations that must be taken into account in deciding whether to establish such a standard. 46 U.S.C. 4302(c)(4). At least in the present circumstances, however, the Coast Guard's consultation with the Advisory Council about whether to institute a rulemaking proceeding, without some further action by the Coast Guard itself beyond the 1990 letter to the Chairman of the Council accepting the recommendation not to do so, does not constitute the sort of agency action to which preemptive effect should be attributed. Nor does the fact that notices of the Advisory Council's meetings were published in the *Federal Register* (see J.A. 1-11; Br. in Opp. 6-7 & n.2) affect that conclusion. As the notices themselves recite, they were published in accordance with the provisions of the Federal Advisory Committee Act that apply to such committees generally. See 5 U.S.C. App. § 10; *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 446-447 (1989).

occasion in this case to decide what degree of formality or type of procedure would be necessary in any given context for a particular agency action to have preemptive effect. That is especially so because, as explained below, the stated rationale in the Coast Guard's 1990 letter does not in any event support a finding of preemption.

b. Even if the 1990 letter were regarded as the Coast Guard's official explanation for an agency decision having the force of law, the imposition of common-law tort liability based on a manufacturer's failure to install propeller guards would not be in conflict with any policy judgment set forth in the letter. Contrary to respondent's contention, the letter did not state or imply that the Coast Guard had found propeller guards to be "technologically infeasible, economically unjustified, and likely to *increase* safety hazards." Br. in Opp. 26. Nor did the letter state (for example) that the Coast Guard had rejected a propeller guard requirement because it had determined that manufacturers must be afforded the unfettered discretion to offer a mix of propeller-related options or that informed consumers must be afforded an opportunity to choose between vessels that are and those that are not equipped with such mechanisms—a policy judgment that could indeed be subverted by imposition of common-law liability for failure to install a guard. Cf. *Geier*, 529 U.S. at 881 (common-law claim based on manufacturer's failure to install airbags held preempted where imposition of tort liability "would have presented an obstacle to the variety and mix of devices that the federal regulation sought").

Rather, the principal justification offered in the 1990 letter for the Coast Guard's decision to take no regulatory action to require propeller guards at that time was that "[t]he regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Pet. App. 40. Those sentences simply

announced the agency's conclusion, given the evidence available *at that time*, that affirmative imposition of a federal propeller guard requirement could not be justified under the relevant statutory criteria. Particularly in light of the FBSA's saving clause, such a determination is not, standing alone, a sufficient basis for finding state common-law actions to be preempted. See pp. 17-20, *supra*. A decision not to regulate at the federal level is consistent with either (1) a determination that there is no justification for a uniform federal solution, but States may impose damages liability as they see fit; or (2) a determination that there should be no federal regulation *or* state common-law damages liability. In light of the Act's saving clause, the 1990 letter is simply too thin a reed to support the latter conclusion.

The 1990 letter also noted "the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation," and it observed that "the question of retrofitting millions of boats would certainly be a major economic consideration." Pet. App. 40. Imposition of common-law tort liability is not inconsistent with either of those reasons for the Coast Guard's decision to take no regulatory action at that time to require propeller guards. Resolution of private tort suits involving particular models of boats or engines does not require the identification of "a universally acceptable propeller guard." Cf. p. 7, *supra* (discussing proposed rule to require measures to guard against propeller strikes specifically on houseboats). And while the potential for tort liability may create economic incentives for particular forms of (productive or unproductive) behavior, the possibility of a damages award in an individual case involving a particular type of boat or engine is not reasonably equated with a legal requirement that "millions of boats" be retrofitted.

Finally, the 1990 letter stated that "[t]he Coast Guard will continue to collect and analyze accident data for changes and

trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art." Pet. App. 40-41. The letter thus expressly contemplated continuing federal scrutiny of the propeller guard issue in light of additional information, including information regarding the development of new safety devices. That fact further undermines any inference that the Coast Guard's determination not to institute rulemaking proceedings in 1990 was intended to resolve definitively the question whether propeller guards improve recreational vessel safety and should be required, allowed, or prohibited on boats covered by the Act.[8]

In the end, respondent's characterization of the basis for the Coast Guard's 1990 decision is not actually grounded in the text of the letter itself. Rather, respondent presumes that, in adopting the bottom-line recommendation of the Advisory Council, the Coast Guard endorsed all the subsidiary

[8] The Coast Guard has continued since 1990 to study various proposals regarding propeller guards and alternative means of reducing the number of propeller strike deaths and injuries. See pp. 6-7, *supra*. The Coast Guard's requests for public comment on those issues are fully consistent with its conclusion in 1990 that the data at that time did not warrant imposition of a federal propeller guard requirement. Contrary to respondent's contention (Br. in Opp. 10-11), the agency's statement in the course of one such notice that, "[u]nder current Federal statutes (46 U.S.C. 4306), the States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction," 61 Fed. Reg. 13,125 (1996), is not a basis for finding implied preemption. As the citation to 46 U.S.C. 4306 makes clear, the Coast Guard's statement referred to the FBSA's categorical preemption of state positive laws and regulations. Section 4306, when read in light of the saving clause, does not encompass common-law tort claims. See pp. 12-13, *supra*.

findings contained in the Propeller Guard Subcommittee's report, even though nothing in the letter expressly endorses those findings or incorporates them by reference. That conclusion would not be justified even if the underlying report had been prepared by subordinate officials within the agency itself. Cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). But it is particularly inappropriate for a court to conclude that the Coast Guard, in deciding to "take no regulatory action to require propeller guards" (Pet. App. 40), necessarily or presumptively endorsed the reasoning of a body located *outside* the government. Although the Secretary is required to consult with the Advisory Council before prescribing regulations under the FBSA, see 46 U.S.C. 4302(c)(4), and its members undoubtedly possess relevant expertise, the Act makes clear that it is not to be regarded as a federal entity. See 46 U.S.C. 13110(d) (payment to members for service on the Council "does not make a member of the Council an officer or employee of the United States Government for any purpose"). In light of the Coast Guard's duty to exercise independent judgment in considering the Advisory Council's recommendations, the Council's findings cannot properly be attributed to the Coast Guard absent express agency endorsement.

A communication such as the 1990 Coast Guard letter, although relatively informal in character, would typically be subject to careful review within the agency, in order to ensure that it explains (to the extent the agency believes appropriate) the basis for the decision the agency has actually made, without prematurely committing the agency to a position on ancillary questions that it has not yet definitively resolved. The preemption analysis that respondent proposes, under which an agency may be taken to have endorsed *sub silentio* the findings of an advisory body located outside the government, would substantially complicate the process by which federal agencies formulate and communicate their po-

licy determinations, especially in response to recommendations made by outside persons or bodies. A focus on the agency's *stated rationale* for its decision, by contrast, adequately protects against encroachment by state authorities while preventing "inadvertent" preemption of state law. Cf. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) ("because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, [the Court] can expect that they will make their intentions clear if they intend for their regulations to be exclusive"). In light of the stated ratio[illegible]e for the Coast Guard's decision not to impose a federal propeller guard requirement in 1990, there is no basis for concluding that imposition of tort liability in the present circumstances would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

REX R. SPRIETSMA, AS ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED,

Petitioner,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION,

Respondent.

On Writ Of Certiorari to the Supreme Court Of Illinois

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991) 14

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Laurence H. Tribe, *American Constitutional Law* § 6-25, at 479-80 (2d ed. 1988) 12

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 lawyers primarily represent injured plaintiffs in civil actions. The Admiralty Law Section of the Association includes most of the attorneys who specialize in representing plaintiffs in maritime personal injury litigation.

State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from manufacturers of dangerous products. Federal maritime common law has also developed strict liability principles which apply to injuries caused by defective or unreasonably dangerous products. Increasingly, defendants in tort actions seek refuge in the doctrine of federal pre-emption. In too many instances, immunity from common law tort law is urged by those whose real objective is immunity from any accountability. Where Congress has not provided for meaningful alternative regulation and remedies, pre-emption would result in failure of government in one of the most fundamental obligations to its citizens -

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1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

- the right to legal recourse for injury. One of the tenets of ATLA's mission is to preserve the right of access to justice.

Our brief will be limited to the question whether the Federal Boat Safety Act preempts state or maritime causes of action contending that a pleasure motor boat was defectively designed, without particular reference to the facts in this case.

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois erred in finding pre-emption of the Petitioner's common law product liability claim, contrary to the plain statement of Congressional intent found in the words of the Federal Boat Safety Act. In so doing, the Illinois court misconstrued the several recent decisions of this Court setting out the proper standards for determining federal pre-emption.

In this case, and in many others, manufacturers and others subject to federal safety regulations assert pre-emption as a shield against product liability suits. Their argument is that tort causes of action are simply another form of regulation. Therefore, they contend, the plain meaning of express pre-emption of state regulation, requirements, or standards also encompasses tort remedies.

To the contrary, tort liability differs dramatically from administrative regulation and serves other important interests. Congress cannot therefore be presumed to intend pre-emption of state legislative and administrative regulation to include tort remedies unless Congress has made its intent explicit and unambiguous.

Courts have long viewed tort liability as not inconsistent with federal regulation, characterizing such regulations as establishing a floor, but not a ceiling, on the duty to market safe products. Tort causes of action provide legal redress for injury, a fundamental right afforded by state law. It is unlikely that Congress would intend the drastic restriction of the right to seek compensation for injuries without clear indication that it so intends.

Although both product liability and administrative safety regulations seek to promote the safety of products, tort liability does so without direct government action. Rather, by requiring manufacturers to bear the cost of harms caused by unreasonably dangerous products, the tort system leaves decisions regarding safety to private parties responding to market forces. This Court has recognized that the indirect incentives for safety stemming from potential tort liability are not the type of direct state mandates that Congress generally seeks to pre-empt. The court below erred in finding that products liability actions were impliedly pre-empted as an "obstacle" to the objective of Congress. Courts exceed their own authority when they seek out "implied" pre-emption in the face of express provisions in the statute that provide a "reasonable indicium" of congressional intent.

Finally, the cause of action for wrongful death available to the Petitioner is afforded under the federal maritime common law. This Court and all of the federal courts have recognized a maritime common law cause of action in strict liability for injury caused by defective and unreasonably dangerous products under Restatement of Torts (Second) § 402A. This federal common law cause of action clearly is not pre-empted

by the FBSA provision prohibiting state "laws" or "regulations". The failure of the Coast Guard to actually regulate to the extent of its authority does not pre-empt other laws by implication.

ARGUMENT

I. INTRODUCTION

Congress enacted the Federal Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ["FBSA"] in response to the dismaying number of accidents associated with recreational boating. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). Among the injuries and fatalities cited by the Senate Committee on Commerce were 58 persons struck by boats or propellers in 1970 alone. *Id.* at 10.

The FBSA was designed "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public". S. Rep. 92-248, reprinted in 1971 U.S.C.C.A.N. 1333. The statute authorized the Secretary of Transportation ". . . to prescribe regulations . . . establishing **minimum safety standards** for recreational vessels and associated equipment. . . ." 46 U.S.C. § 4302(a) (emphasis added). The Secretary has delegated the regulatory authority to the Commandant of the United States Coast Guard. Sections 4302(b) and (c) set forth procedures that must be followed to prescribe such regulations, including consultation with the National Boating Safety Counsel. The Coast Guard must also comply with the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

On February 1, 1990, The U.S. Coast Guard announced that it would "take no regulatory action to require propeller guards." The Coast Guard stated it

would continue to collect and review information. *Id.*, 757 N.E.2d at 78.

As discussed at length by Mr. Sprietsma in his Petition for Certiorari, the decision by the Coast Guard not to begin the regulatory process with respect to propeller guards in 1990, did not constitute a formal rule making proceeding, and did not result in any regulatory action. The Coast Guard did not attempt to undertake the notice-and-comment rule making requirements of the Administrative Procedure Act, 5 U.S.C. Section 553. As of this date, there is still no federal regulation with respect to propeller guards, either requiring or prohibiting their use by federal law. However, since that original decision not to issue regulations, the Coast Guard has in fact opened the rule making process. In 1995 the Coast Guard issued an Advance Notice of Proposed Rule making requesting public comment on the use of propeller guards on houseboats. In 1996, the Coast Guard issued another ANPRM to seek information about injuries involving propeller strikes and rented boats. In 1997, the Coast Guard sought public comment on boating accidents involving rented powerboats in which people have been injured by the propeller. The Coast Guard has extended the period for comments and is still considering whether specific federal regulations are appropriate. Petition, pp. 5-7.

The FBSA contains a specific pre-emption provision in 46 U.S.C. § 4306:

> [A] State . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is

> not identical to a regulation prescribed under Section 4302 of this title.

The statute also has a plainly stated savings clause in 46 U.S.C. § 4311(g):

> Compliance with this chapter or standards, regulations or orders prescribed under this chapter does not relieve a person from liability at common law or under state law.

The accident which is the basis of this suit occurred when the decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the blades of the propeller, which caused serious injuries resulting in her death. The petitioner filed a wrongful death action against Mercury Marine in the Circuit Court of Cooke County, Illinois. The complaint alleged that the boat engine was defective in design and unreasonably dangerous because it was not equipped with a propeller guard. The trial court granted a motion to dismiss the complaint, finding that the claim was pre-empted by the Federal Boat Safety Act and the Coast Guard decision to take no regulatory action to require propeller guards.

In the appeal below, the Supreme Court of Illinois correctly held that the FBSA does not expressly pre-empt the cause of action asserted in this complaint because of the clearly stated savings clause in Section 4311(g). The Illinois Court correctly found itself bound by the decision of this court in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), noting that this Court stated: ". . . that the inclusion of a savings clause prohibits a broad reading of the express pre-emption provision." The court noted that the presence of a savings clause "assumes that there are some significant

number of common law liability cases to save. . . . We agree that section 4311 limits section 4306. Consequently, we find no express pre-emption." *Id.* 757 N.E. 2d at 80-83.

However, Amicus submits that the Illinois court erred in finding implied conflict pre-emption of Mr. Sprietsma's common law remedy, in the face of clearly stated congressional intent to the contrary. The Illinois court recognized that this Court has found implied conflict pre-emption where it is ". . . impossible for a private party to comply with both state and federal requirements . . .", or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.. . ." *Id.* at 82 (citations omitted). The court then also recognized the task before it:

> Since it is not impossible for a manufacturer to comply with a state common law rule requiring propeller guards, and the Coast Guard's decision not to require them, we will address whether a state common law tort claim based on failure to install the guards stands as an obstacle to the accomplishment of the purposes and objectives congress sought to achieve in enacting the FBSA. *Id.* at 82.

However, Amicus submits that the Illinois Court missed the point when it became entangled in the question of "regulatory uniformity," and thus completely overlooked the primary objective of Congress in passing the Federal Boat Safety Act, which was ". . . to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public. . . ." S. Rep. Nos. 92-248 (1971) .

We urge the Court to hold that the Illinois Court, in finding implied pre-emption in this case, failed to correctly apply the principles for determining federal pre-emption set forth in the decisions of this court in *Cipollone v. Liggett Group, Inc.* , 505 U.S. 504 (1992); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Medtronic , Inc. v. Lohr*, 518 U.S. 470 (1996) and *Geier v. American Honda Motor Co., supra,* as correctly set out in length in the Petition and discussed in a different context below. In particular, the Illinois court failed to recognize the difference between the Coast Guard's decision not to regulate under the FBSA and the regulations involved in *Geier*, which set forth in detail the variety and mix of devices permitted and the gradual passive restraint phase-in that were deliberately imposed by the Department of Transportation in Federal Motor Vehicle Safety Standard 208.

This Amicus agrees with the Petitioner that the Illinois Court erred in affording pre-emptive effect to the Coast Guard's regulatory inaction, discussed at length in the Petition for Writ of Certiorari at pp. 15-20. The Illinois Court also erred in failing to assign appropriate weight to the United States' own interpretation of the effect of the Coast Guard action on propeller guard, where the brief of the Solicitor General as Amicus Curiae in *Lewis v. Brunswick Corporation, supra,* was made a part of the record in the lower court proceedings in this case. Petition at pp. 23-25.

Amicus further submits that the Illinois Court erred in equating a damage award to the plaintiff in this product liability tort case to a state statute or

regulation requiring specific action by boat manufacturers.

Finally, the Illinois Court clearly erred in failing to recognize that Mr. Sprietsma's cause of action for the death of his wife is governed by federal maritime common law, a remedy which clearly is not pre-empted by the provision in this statute prohibiting the adoption of state statutes or regulations.

II. CONGRESSIONAL INTENT TO PRE-EMPT STATE POSITIVE LAW OR REGULATION DOES NOT ORDINARILY EXTEND TO PRE-EMPTION OF PRODUCT LIABILITY ACTIONS IN THE ABSENCE OF A PLAIN STATEMENT OF INTENT TO DO SO.

The notion that administrative regulation and common law liability are so similar that congressional intent to pre-empt the former naturally encompasses intent to pre-empt the latter lies at the heart of many lower court decisions finding pre-emption of tort remedies. Amicus suggests that this proposition misapprehends the nature of tort law, particularly product liability law, and its relationship to government regulation.

The ultimate goal in any pre-emption analysis is to determine the intent of Congress. In the FSBA, Congress has expressly prohibited the states from adopting laws or regulations which require safety standards or equipment which are not identical to regulations promulgated under the statute. However, Congress also expressly saved common law tort remedies, providing that compliance with the statute and ordinances prescribed under it "does not relieve a person from liability under common law or state law."

If Congress intended to pre-empt common law tort lawsuits, should it have not clearly so stated in the pre-emption clause where it prohibited states from adopting "a law or regulation" inconsistent with the statute? This is the central question presented in this case and in a great number of cases arising in the lower courts where regulated industries assert federal pre-emption as an immunity from product liability actions under state law. Indeed, it is a question this Court has asked. *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Transcript of Oral Argument at 12-14, 18-19 (Oct. 8, 1991).

The Court addressed this question in plurality opinions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S.470 (1996). Although the Court there set out the proper pre-emption analysis, the path is perhaps not well lighted. Amicus urges the Court to address this important issue here.

Concern for safety has prompted Congress to authorize a number of federal administrative agencies to promulgate standards or requirements related to product safety. Frequently, such legislation expressly pre-empts state regulation, requirements, standards, or laws. *E.g,*. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(d); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; Federal Flammable Fabrics Act, 15 U.S.C. § 1203; Federal Hazardous Substances Act, 15 U.S.C. § 1261, note (b)(1)(A); Federal Food, Drug and Cosmetics Act Medical Device Amendments of 1976, 21 U.S.C. § 360k(a). Unquestionably, Congress intended to avoid subjecting regulated industries to a multiplicity of state

legislative or administrative requirements. In some of these acts, neither the text of the statute nor the legislative history indicates that Congress gave substantial thought to eliminating common law remedies.

Federal pre-emption of state law was not intended by the drafters of the Supremacy Clause to be a problem, but a solution to potential conflicts between the national government and state government, each exercising sovereign power over its citizens. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). This Court has consistently held that pre-emption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for pre-emption). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

It would not be unreasonable for the Court to require that if Congress truly intends to restrict common law remedies, it do so in explicit and unambiguous language. After all, "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989) *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. 1993)("Congress has not failed to make such pre-emption clear when it desires to do so.").

A "plain statement" rule instructing courts to find pre-emption of state common law causes of action only where Congress has explicitly referred to them would serve to protect the role of the states in our federalist system and would prevent courts from exceeding their

judicial authority. "Application of the plain statement rule thus may avoid a potential constitutional problem." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991).

The strong presumption against pre-emption thus safeguards state autonomy. Laurence H. Tribe, *American Constitutional Law* § 6-25, at 479-80 (2d ed. 1988), quoted in *Gregory*, supra; Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181, 182 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 112 (1988)("The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it pre-empts state legislation.")

At the same time, as Judge Kenneth Starr has observed, the "plain statement" rule also preserves the proper role of the judicial branch. "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr, et al., *The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association*, at p. 48 (1991).

Nevertheless, the Illinois court and several federal courts have "discovered" an express or implied Congressional intent to eliminate product liability actions based solely on the express pre-emption of state law, regulation, requirements or standards. Under this view, the plain meaning of the statutory language includes all regulation, both by positive law and by common law remedies. See *Lewis v. Brunswick Corp.*,107

F.3d 1494,1501(11th Cir.1997); Robert S. Adler and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895, 941 (1994).

III. ADMINISTRATIVE REGULATION AND TORT LIABILITY ARE FUNDAMENTALLY DIFFERENT AND THE COURT SHOULD PRESUME THAT CONGRESS INTENDED TO PRESERVE THIS TWO-PRONGED MEANS OF PROMOTING SAFETY IN THE WORDING IT CHOSE FOR THE FEDERAL BOAT SAFETY ACT.

Amicus submits that such a presumption in favor of pre-emption of state common law actions misapprehends the purpose and function of tort law. Administrative regulation and tort liability are fundamentally different. Indeed, each relies on the strengths of the other in a complementary fashion to protect the health and safety of Americans. Federal lawmakers understand this relationship and when Congress replaces state regulators with federal regulators, it does not ordinarily intend to close the doors of state courthouses as well.

Why would Congress not intend its pre-emption of state regulation to include common law damage actions? The answer lies in the fact that tort liability exerts its influence in a manner that does not pose the same potential for conflict with federal regulations as state positive law. Additionally, tort remedies serve important other interests not addressed by administrative regulation. Congress may be presumed to intend state common law remedies to continue along side a federal administrative scheme since the two have historically been viewed as complements of each other.

Modern product liability law is frequently traced to the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Its most prominent formulation is set forth in Restatement (Second) of Torts § 402A (1965), which has been substantially adopted by at least 36 states. CCH Products Liability Reporter ¶1570 (1993). Its purpose is to provide compensation for harms caused by unreasonably dangerous products and to deter manufacturers from marketing products in a defective, unreasonably dangerous condition. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

Many federal safety regulations are also aimed at ensuring the safety of products entering the marketplace. However, administrative regulation differs from tort liability in so many areas that the plain meaning of "regulation" could not naturally encompass both. Indeed, they are often viewed as polar opposites, which nonetheless complement each other. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984).

In *Cipollone*, the Court emphasized "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. Indeed, federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a

legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965).

Based on this principle, courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984); *Raymond v. Riegel Textile Corp*, 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability."). Previously, this was the position of the Eleventh Circuit with respect to the FBSA. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990)("a manufacturer's proof of compliance with either industry-wide practices, or even federal regulations, fails to eliminate conclusively its liability for its design of allegedly defective products.").

This Court assumes that members of Congress are familiar with common law principles or ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989). Therefore, this Court should presume that Congress intended to preserve this two-pronged means of promoting safety in the wording it chose for the Federal Boat Safety Act.

Congress is also unlikely to deem tort liability as equivalent to state administrative regulation for pre-emption purposes because tort duties and verdicts rendered thereon do not result in imposing specific standards or requirements on regulated defendants. Tort liability exerts its "regulatory" influence only indirectly, by providing market incentives for

manufacturers to invest in safety, rather than by direct governmental commands. Congress is therefore unlikely to view tort liability as posing the same potential conflict with federal safety regulations that direct state regulation involves.

This Court's pre-emption decisions have long recognized the distinction between the indirect effect of tort liability on private decision makers and direct government regulation. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), the Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards." As the Court later explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. . . .We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added).

Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone, supra,* at 505 U.S. 536-37 (Blackmun, J., concurring in part, dissenting in part).

In the same vein, ATLA submits, product liability law which adds the cost of injuries to dangerous products, making safer products more attractive, are not state requirements. Because tort actions do not result in imposing specific design standards or requirements on manufacturers, they do not pose the potential for conflict with federal standards that state administrative regulations present. For this reason, Congress here intended that common law and state causes of action continue while state administrative regulations be pre-empted.

IV. THE SAVINGS CLAUSE IN THE FBSA CLEARLY INDICATES CONGRESS DID NOT INTEND TO EXPRESSLY OR IMPLIEDLY PRE-EMPT PRODUCT LIABILITY ACTIONS.

A provision added to the FBSA by the Senate committee provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability under common law or under State law.

46 U.S.C.A. § 4311(g).

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) is plain. As explained by the Senate Report:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer

> with the **minimum standards** promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Therefore, the Illinois court was obviously correct in concluding that the cause of action asserted in this case was not expressly pre-empted by the statute. However, in the face of that clear statement of Congressional intent, the Illinois court nonetheless found implied pre-emption.

Even if "obstacle" pre-emption can properly be applied to state tort remedies, the court erred in its application here. The Illinois court stated that Petitioners' product liability claims would conflict with Congressional intent to impose regulatory uniformity by vesting exclusive regulatory authority in the Coast Guard. 757 N.E.2d at 85. In so concluding, the court clearly overlooked the primary objective of Congress in enacting the Federal Boat Safety Act, which was ". . . to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public . . . ." It also overlooked the clear indication that Congress did not intend the Coast Guard's regulatory authority to exclude all state authority. Congress authorized the Coast Guard to develop "minimum safety standards", 46 U.S.C. § 4302, and also specifically stated that compliance with those minimum standards "does not relieve a person from liability at common law".

On this issue, we believe that the dissent below got it right in concluding that implied pre-emption could not be found in the face of the specific wording of the statute:

> I also disagree with the result the majority reaches on the merits. My colleagues go to enormous lengths to uphold a finding of preemption when they should be doing exactly the opposite. . . .
>
> In ascertaining congressional intent, our inquiry necessarily begins with an analysis of the language of the statute. The language employed by Congress here could not be more clear. Section 4311(g) of the FBSA expressly provides:
>
> > Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (1994).
>
> If we are to give this provision its plain and ordinary meaning, as we must, Mercury Marine's compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by Sprietsma in this case. Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly.
>
> The Supreme Court of Texas (*Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)) and the Missouri Court of Appeals (*Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999)) have reached the same conclusion on similar facts: the FBSA does not preempt common law tort claims based on failure to install propeller guards. . . .
>
> **While allowing common law tort claims to go forward may seem to create a tension with the**

> **Coast Guard's policy against propeller guards, that is a circumstance we must assume Congress considered when it adopted section 4311(g). If section 4311(g) ultimately proves unworkable when applied as written, that is a matter for Congress and not this court to remedy.**

757 N.E. 2d at 88 (emphasis added).

This Court has instructed that where Congress has expressed its intent in statutory language addressing pre-emption, a court may not look to other sources for "implied" pre-emption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

While there are circumstances in which the legislative language addressing pre-emption does not entirely negate the possibility of implied pre-emption, there is, at the very least, a strong inference that an express pre-emption clause forecloses implied pre-emption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). In this case, the provisions in the FBSA expressly dealing with pre-emption were abundantly sufficient to provide a "reliable indicium of congressional intent." *Id.* Amicus submits that the Illinois court therefore erred by engaging in a search for implied pre-emption.

V. THE FEDERAL BOAT SAFETY ACT APPLIES ONLY TO VESSELS OPERATING ON THE NAVIGABLE WATERS OF THE UNITED STATES. THEREFORE, THE PRODUCT LIABILITY CAUSE OF ACTION IN THIS CASE ARISES FROM FEDERAL MARITIME COMMON LAW, AND THUS IS NOT PRE-EMPTED BY THE STATUTORY PRECLUSION OF STATE LAWS AND REGULATIONS

The wording of the statute describing the scope of its application in Section 4301 clearly limits the provisions of the statute to vessels operating on navigable waters:

> (a) This chapter applies to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States (including the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988) and, for a vessel owned in the United States, on the high seas.

Therefore, the application of the statute is concurrent with the admiralty and maritime jurisdiction of the United States.

The accident which is the basis of this suit occurred on an inlet of Dale Hollow Lake, an impoundment which is navigable between the states of Tennessee and Kentucky, and therefore a waterway subject to the jurisdiction of the United States. (If the accident occurred on a body of water which was not navigable between states or to the sea, the FSBA would not apply and thus would not pre-empt any state law or regulation.)

An accident occurring on a navigable waterway, involving a maritime activity such as the operation of a pleasure boat, falls within the scope of admiralty

jurisdiction and is therefore subject to federal maritime law. *Foremost Insurance Co. v. Richardson*, 457 U.S. 688 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990). Even though this action was filed in state court, federal maritime law must be applied to the product liability cause of action.

The product liability cause of action available to the petitioner arises under federal maritime common law. It is now beyond question that maritime common law has developed its own body of product liability law. Any doubt as to this was eliminated by this court in *East River S.S. Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858 (1986):

> With admiralty jurisdiction comes the application substantive admiralty law . . . . Absent a relevant statute, the general maritime law, as developed by the judiciary, applies . . . . Drawn from State and Federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules . . . . This court has developed a body of maritime tort principles, . . . and is now asked to incorporate products-liability concepts, long a part of the common law of torts, into the general maritime law . . .
>
> The Courts of Appeals sitting in admiralty overwhelmingly have adopted concepts of product liability, based both on negligence, *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (CA3 1945), aff'd on other grounds, 328 U.S. 85, 66 S.Ct. 872, 90 L. Ed. 1099 (1946), and on strict liability, *Pan-Alaska Fisheries, Inc., v. Marine Construction and Design Co.*, 586 F.2d 1129, 1135 (CA9 1977) (adopting Restatement (Second) of Torts §402A (1965)). Indeed, the Court of Appeals for the Third Circuit previously as stated that the question of whether

> principles of strict products liability are part of maritime law "is no longer seriously contested." . .
>
> We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law. This Court's precedents relating to injuries of maritime workers long have pointed in that direction. . . . The Court's rational in those cases--that strict liability should be imposed on the party best able to protect persons from hazardous equipment--is equally applicable when the claims are based on products liability.

476 U.S. at 864-866.

Section 402A of the Restatement (Second) of Torts is now uniformly applied in maritime products liability cases. The wording of this section makes it clear that neither negligence nor any other aspect of the manufacturer's conduct is relevant to a determination of liability:

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in (1) although applies
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The differences between strict liability under § 402A and negligence liability were discussed at length by the Fifth Circuit in each of its opinions in *Lewis v. Timco, Inc.*, 697 F.2d 1252 (5th Cir. 1983), reversed en banc on other grounds, 716 F. 2d 1425 (5th Cir. 1983), opinion on remand, 736 F. 2d 163 (5th Cir. 1984). In the initial panel opinion, the court correctly described the philosophy underlying strict liability under § 402A:

> As a policy matter, strict liability in tort in products cases deals with business or enterprise responsibility: 'public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained' Restatement (Second) of Torts § 402A, comment (1965) . . . Indeed, since the concept of 'strict liability' involves holding a defendant--a manufacturer or a distributor in the products case--answerable without a demonstration of negligence, [fn. 6. A showing of utmost care in the manufacture of a defective item is no defense to a manufacturer in a products liability case.] it is considered by many commentators to be a separate ground for a tort suit.

697 F. 2d at 1255.

The en banc opinion reversed the panel decision only as to whether the plaintiff's comparative negligence could be applied to reduce the damages awarded. Judge Politz, disagreeing with the majority on that

point, did provide further guidance on the nature of the liability imposed under 402A:

> Strict liability is based on a theory of responsibility which requires no finding of fault. The law of strict liability, applicable in some form in most American jurisdictions, is succinctly stated in Restatement (Second) of Torts, § 402A (1965). The comments to the Restatement note that 'the rule applies although [the party] has exercised all possible care.' . . . The comments further note that this action is an alternative to negligence. The elements of a strict liability action are (1) injury, (2) defect, and (3) a causal tie between the two. *Burks v. Firestone Tire & Rubber Co.*, 633 F. 2d 1152 (5th Cir. 1981).
>
> **A negligence action focuses on conduct, specifically the quality of the act causing the injury; a strict products liability action focuses on the product itself.** The moving force behind the strict products liability concept is the determination to reduce the risks defective products impose on society. The rise of strict liability and products liability actions results from the perception that the manufacturing enterprise can best carry the cost of injuries occasioned by defective products as an element of the product cost. Strict liability concerns itself with the relationship between the manufacturer and society as a whole. The relationship between specific plaintiffs and defendants is of secondary importance; it is considered subservient to the interest of the public as a whole.

716 F. 2d at 1433-1434 (emphasis added).

Therefore, on the law which should be applied to the strict liability claim made in this case, the focus of the inquiry and the plaintiff's burden of proof will not be directed toward the defendants' conduct in

designing or failing to design a guard for this outboard motor at the time it was manufactured. Instead, the focus will be on this product and whether it was unreasonably dangerous when put to a foreseeable use. Maritime products liability law will give short shrift to "consumer expectations" created by the conduct of the defendant manufacturers themselves. Feasibility, as such, may or may not even be an issue in this case, depending on facts developed in discovery which has yet to be conducted.

The question of whether the manufacturer provided adequate warning may or may not also be an issue in this case. As the Fifth Circuit stated in one of its leading products liability cases, "Any . . . product user has a right to decide whether to expose himself to the risk." *Borel v. Fiberboard Paper Products Corp.*, 193 F. 2d 1076, 1106 (5th Cir. 1973). Strict liability, including liability for failure to warn, is available in maritime actions for injury or wrongful death. *Soileau v. Nicklos Drilling Co.*, 302 F. Supp. 119 (W.D. La. 1969). See also, *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F. 2d 330 (5th Cir. 1984), where the Fifth Circuit affirmed a district court finding that the boat was not unreasonably dangerous in its design or manufacturer, but reversed because the district court had failed to apply the proper standards to the manufacturers strict liability for failure to warn.

Admiralty law has frequently adopted applicable state law principles, where no governing federal statute or principle of maritime common law applied. *Just v. Chambers*, 312 U.S. 383 (1941). The maritime law clearly permits the incorporation of applicable state statutes for the purpose of determining

damages recoverable for wrongful death, where no federal statute specifying the damages is applicable. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

However, where established principles of maritime law exist, the rights and liabilities of the parties will be governed by maritime law principles, to the exclusion of any inconsistent state laws. For example, in *Cossick v. United Fruit Company*, 365 U.S. 731 (1961), the federal maritime law rule validating oral contracts precluded the application of a state statute of frauds. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), this court held that the admiralty common law comparative negligence rule barred the application of a state contributory negligence rule. Similarly, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), this court held that the federal maritime rule allocating the burden of proof displaced a conflicting state rule. In *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), Cert. denied, 419 U.S. 884 (1974), the Court of Appeals held, in a case involving a passenger who fell from a pleasure boat and was injured by the propeller, that federal maritime substantive law applied to the exclusion of a state statute limiting recovery for social guests on boats, because that statute would have defeated a federal right of recovery.

Even where a state statute is adopted by federal maritime law to provide the damages recoverable for wrongful death, as would be done in this case, the substantive law determining the rights and liabilities of the parties is still to be drawn from established maritime law principles. *Calhoun v. Yamaha Motor Corp. U.S.A.*, 216 F.3rd 338 (3rd Cir. 2000)(appeal after remand).

The product liability cause of action available to the petitioner in this case should be based upon the principles of strict manufacturers liability, now fully incorporated into the maritime products liability common law as recognized in *East River*, supra. Under this analysis, the extent to which tort remedies under Illinois or Tennessee law are pre-empted by the Federal Boat Safety Act would be immaterial. The wording of Section 4306, prohibiting the adoption of state laws or regulations, does not remotely approach pre-emption of remedies afforded under federal maritime common law. To the contrary, the maritime common law remedy is clearly preserved by the anti-pre-emption provision contained in Section 4311(g).

The decision of the Coast Guard not to adopt regulations with respect to propeller guards creates a situation analogous to that presented to this court in the recent decision in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002). In that case, the Coast Guard had not exercised its authority to adopt regulation governing workplace conditions aboard uninspected vessels, although it had authority to do so and had applied certain marine safety regulations to vessels of that type. This court held that because the Coast Guard had failed to exercise its regulatory authority over working conditions on uninspected vessels, its action in adopting limited regulations did not pre-empt the application of the workplace safety regulations of the Occupational Safety and Health Administration. In so holding, this court stated:

> Congress' use of the word "exercise" [in Section 653(b)(1) of the Occupational Safety and Health Act] makes it clear that . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions on vessels . . . does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes it clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated . . . .

Slip Opinion at pp. 3-4.

Applying these principles, this court should hold that the Coast Guard's decision not to exercise its regulatory authority under the Federal Boat Safety Act cannot rise to the status of "a regulation prescribed under Section 4302" of the statute, and therefore has not created any pre-emption of common law or state law under Section 4306 of the Federal Boat Safety Act.

Under established maritime law principles, the product liability remedy sought by the Petitioner should be allowed, since it is not clearly prohibited. As this court noted in *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 214, quoting from *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970): "The decision recalled that 'it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it be established and inflexibles.' *Id*, at 387 (quoting *The Seagull*, 21 F. Cas. 909, 910 (no. 12,578)(CC Md. 1865)."

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the Supreme Court of Illinois and hold that the common law tort action pursued in this case is not pre-empted by the Federal Boat Safety Act.

Respectfully submitted,

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Respondent.

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BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, HAWAII, INDIANA, MARYLAND, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OREGON, UTAH, WASHINGTON, WEST VIRGINIA

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the undersigned Attorneys General of the States of Missouri, Arkansas, California, Connecticut, Florida, Hawaii, Indiana, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, Utah, Washington, and West Virginia submit this brief in support of Petitioners Rex Sprietsma, *et al. Amici* have a strong interest in preserving the appropriate balance of authority between the States and the federal government. They regularly defend not just statutory but also common law rights of states, state officials, and state subdivisions – rights that are threatened by the rule adopted by the court below. Attorneys general use powers granted both by statute and by the common law to protect the public health, safety, and welfare of the citizens of their states. The use of those powers is threatened because the court below improperly refused to apply a long-standing presumption against preemption of state law that has long been grounded in deference to state sovereignty in policing health and safety. *Amici* ask this Court to correct that error and restore this critical safeguard of federalism by both reversing and by explaining that a federal statute shall not nullify state law claims in the absence of a clear Congressional mandate to preempt those claims.

Amici also believe the lower court's decision here improperly preempted a state law claim on the basis of regulatory *inaction*, despite an express indication from Congress that compliance with the applicable statute would not insulate tortfeasors from common law liability. Although *amici's* primary focus in this brief is based on our concern that

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[1]Some portions of this brief were originally drafted by Steve Baughman Jensen, Esq. of Dallas, Texas. Mr. Jensen is not a counsel for any party.

the court below abandoned the general presumption against preemption, we also share the specific concern that Petitioner's claims here should not have been preempted in the complete absence of any federal regulation governing propeller guards. Thus, *amici* also express their support for the position taken by Petitioner regarding the specific preemption question before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether federal law will preempt state common law claims that a recreational motor boat engine was defectively designed when it is clear that: (1) the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. 1993), expressly provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law" (46 U.S.C. § 4311(g)); and (2) the U.S. Coast Guard has never adopted any standard or regulation with respect to the subject matter of the underlying lawsuit, propeller guards.

The *amici* state attorneys general urge this Court to affirm its historical deference to the interest of states in exercising their police power to protect the health and safety of state citizens through provision of tort remedies. The court below turned federalism on its head by refusing to apply the long-standing presumption *against* federal statutory preemption of state law remedies. Rather than recognizing that the states, and *not* the federal government, have historically exercised authority in the areas of non-commercial boat safety design, the court below declined to defer to the states' interests in preserving their common law on the basis that this lawsuit involves "an area where there has been a history of significant federal presence." App. ___ (quoting *U. S. v. Locke*, 529 U.S.

89, 108 (2000)). This deference both misapplied *Locke*, and, more importantly, reflected a fundamental misunderstanding of the respective historical regulatory roles of the federal government and the states, particularly in the area of boat safety.

Quite unlike the *Locke* decision, this case involves purported preemption of state common law remedies by a federal statute aimed at regulating certain elements of non-commercial boat safety. In sharp contrast, *Locke* involved preemption of state administrative regulations of commercial ship navigation by federal administrative regulations which governed that very activity. *Sprietsma* thus differs from *Locke* in at least two significant ways: 1) it involves preemption of remedial common law tort claims, rather than conflicting administrative regulations; and 2) it involves a federal statute in the area of pleasure craft safety, rather than a statute governing commercial navigation. Both of these distinctions demonstrate that the lower court erred by relying on *Locke*.

Furthermore, Mr. Sprietsma's lawsuit does not implicate the federal government's historical role in regulating maritime law. Until 1971, the federal government had only a narrowly circumscribed role in regulating non-commercial watercraft. Nor could it be said that federal admiralty jurisdiction itself creates a historical federal interest in this setting. This case has not been litigated in admiralty, and it is unlikely that admiralty jurisdiction exists under these circumstances. Moreover, even if this case were subject to admiralty jurisdiction, under this Court's decision in *Yamaha Motors Corp. v. Calhoun*, 516 U.S. 199 (1996), a state's interest in having its own remedies applied in this context would outweigh any countervailing federal interest in uniformity. When, as here, a boat accident involves a non-seaman, implicates no rules of navigational safety, and is wholly unrelated to commercial maritime activity, it is the states, and *not* the federal government, which have both the

greater current and historical interest in applying their own law and dictating a proper remedy. Thus, this case does *not* involve "an area where there has been a history of significant federal presence," and this Court should give full force to its general presumption against preemption of state common law claims.

ARGUMENT

1. The presumption against federal statutory preemption of state common law claims plays a critical federalism role in protecting the police powers of the States.

The long-standing presumption against statutory preemption of state common law tort claims serves a primary function of federalism by ensuring that federal authority does not insidiously intrude upon the States' historical role in policing health and safety unless Congress clearly and specifically intended such a result.

This Court has repeatedly said that preemption of state efforts to protect health and safety "should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (internal quotation omitted). Local laws relating to health and safety are "those 'the Court has been most reluctant to invalidate.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (citation omitted).

One of the vital "procedural safeguards inherent in the structure of the federal system," *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552 (1985), is the requirement of a crystal-clear statement of Congressional intent before the States are stripped of the right both to govern themselves and to ensure their residents' redress for injuries caused by unsafe products.

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988). *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., dissenting) (quoting the same sentence of AMERICAN CONSTITUTIONAL LAW and describing *Gregory* as "applying this argument"); and Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 50-51 (1991) (The requirement of a "clear legislative intent to preempt" is also "consistent with the Court's reliance on clear statement rules in other areas of the law.").

Even outside the health and safety context, this Court has declined to affirm preemption unless it finds "an unambiguous congressional mandate" to preempt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). Ambiguity is not tolerated; "pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New*

York State Labor Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

By failing to apply the presumption against preemption and by giving preemptive force to a federal statute in the absence of a clear Congressional directive to do so, the court below undermined the importance of the "federalist structure of joint sovereigns" and upset the "proper balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. at 459. This Court should restore that balance by reversing and underscoring the importance of the presumption against preemption in this context.

2. The court below improperly relied upon *U. S. v. Locke* in refusing to apply a presumption against preemption.

The lower court's refusal to apply the long-standing presumption against federal statutory preemption of state common law tort claims in this case was premised on the lower court's improper application of this Court's decision in *U. S. v. Locke*, 529 U.S. 89 (2000). *See* Cert. App. 5-6. Unlike the commercial navigational rules at issue in *Locke*, design of recreational boats has not historically been an area of federal concern. Moreover, in contrast to the administrative law regulations, such as those promulgated by the State of Washington (and determined to be preempted by the Ports and Waterways Safety Act) in *Locke*, state common law claims serve a unique non-regulatory, compensatory purpose.

In *Locke*, this Court invalidated a set of administrative law regulations issued by the State of Washington, governing commercial vessels navigating through a state which "is the site of major installations for the Nation's oil industry and the destination or shipping point for huge volumes of oil and its end products." 529 U.S. at 95, 97. Washington ports are a

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destination for both U.S. oil tankers and foreign flag tankers from places such as Venezuela and Indonesia. *Id.* at 96. The state regulations at issue in *Locke* purported to govern the "design, equipment, reporting, and operating requirements" of oil tankers traveling to and from Washington ports. *Id.* at 97. This Court held that the Ports and Waterways Safety Act of 1972, 33 U.S.C. § 1221, *et seq.* preempted those Washington requirements. In reaching this result, this Court noted that because the state law regulations at issue there dealt with matters of "national and international maritime commerce," an area in which there has unquestionably been a "history of significant federal presence," the Court would not apply the ordinary presumption against preemption of state law. *Id.* at 108. Such a presumption should not apply in that context because "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*

Other than the fact that this case also involves water, it has nothing in common with *Locke* and does not implicate any interest of historical federal concern. The accident that caused Petitioners' decedent's death occurred on Dale Hollow Lake, which is a recreational lake on the Tennessee-Kentucky border created by the Army Corps of Engineers to supply hydroelectric power to the region. There is no evidence in the record that *any* maritime commerce occurs on the lake, nor is there any evidence that the "commercial marinas" in operation at the lake house anything other than pleasure boats. The injury in this case happened when the decedent fell off a ski boat and was killed by the propeller of the boat in which she had been riding. There was no collision with another vessel, and nothing about the incident implicates navigational safety rules established under federal maritime law. Instead, the focus of this case is on the design of a recreational boat, which is something the federal government did not first attempt to regulate in any substantive

fashion until in 1971, with the passage of the Boat Safety Act.

The relative novelty of federal involvement in recreational boat safety regulations stands in sharp contrast to centuries of tradition of strong federal control of interstate and international maritime commerce, which was directly at issue in *Locke*. Before 1971, the policing of recreational boat design was left almost entirely to the States. Moreover, even if one were to conclude (incorrectly) that there has been "a history of significant federal presence" with respect to *regulation* of recreational boat design, such a history would not support abandonment of the presumption against preemption of *common law claims*, which have little regulatory impact and serve a quite different purpose.

Although awarding damages for injuries after the fact may have a deterrent effect, its principal and unique purpose is the compensation of injured victims. "Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). The tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular victim and a particular tortfeasor. Tort law is tied to the goal of compensation. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (for this reason, "*[e]very State* has a body of tort law serving" its "compelling interest" in "ensuring that victims ... are compensated by those who harm them.")(emphasis added).

By contrast, statutes and regulations are typically prospective in nature. They focus not on compensating persons for injuries already sustained, but on preventing socially harmful activities. "Regulation is not designed to provide or account for compensation" to the victims of dangerous products

and their families. Mary Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 172 (1995). Safety standards can only attempt to head off injuries in the future – including injuries for which common law torts provide remedies.

The difference between the tort and regulatory systems means that a Congressional decision to prevent States from adopting conflicting administrative and statutory law enactments – such as those at issue in *Locke* – is entirely different from a decision to curtail the compensatory function of tort law. A State should be able to provide a judicial system that resolves claims for wrongful injuries to its citizens and to decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries it could have prevented. To hold otherwise would collapse the tort system's secondary purpose, deterrence, into its primary purpose, relieving the financial burden on those who are injured by the negligent acts of others.

This Court has recognized the distinction between goals of regulation and the tort system as being an important additional basis for applying the presumption against preemption in the context of common law tort claims. This is true both because tort claims have minimal regulatory impact and because regulatory schemes fail to compensate tort victims. *E.g.*, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954) (where Congress "neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct," this Court refused "to cut off the injured respondent from this right to recovery," observing that to do so would "deprive it of its property without recourse or compensation" and "in effect, grant petitioners immunity from liability for their tortious conduct."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (where there was "no indication that Congress even seriously considered precluding

the use of [tort] remedies," this Court declined "to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct"). In *Medtronic v. Lohr*, 518 U.S. 470, 486 (1996), a plurality observed that an argument that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" would be "implausible."[2]

In sum, the basis for this Court's decision not to apply a presumption against preemption in *Locke* rested on two factors that are entirely absent here: 1) the existence of an unquestionably significant, centuries-long historical federal role in the area being regulated; and 2) the application of a state administrative regulation, rather than a common law damages claim. This Court should correct the lower court's misinterpretation of *Locke* and clarify that the presumption against preemption has full application in cases such as this one.

3. The relationship between this case and admiralty law is marginal, and in no way supports abandonment of the presumption against preemption.

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[2] *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 175 (1989) ("For a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citations omitted).

Besides relying upon *Locke*, the court below also inappropriately invoked federal maritime law to support its decision to discard the important requirement that Congress must express a clear intent to trump state law before courts may give preemptive effect to a federal statute. *See* Cert. App. 5 ("[T]he claim also encompasses maritime activity, which is traditionally within the realm of federal regulation.") (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917) ("Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country")). However, this broad brush analysis is inappropriate, as any relationship of this case to admiralty jurisdiction and federal maritime law is marginal at best. This case involves an injury to a non-seaman, who alleges injury caused by the design of a recreational boat, in an accident that in no way implicates rules of navigational activity, on waters that support little or no maritime commerce. Surely, the flimsy relationship between these facts and traditional maritime activity should provide no basis for abandoning the critical federalism protections embodied within the presumption against preemption.

Traditional state interests in the exercise of the police power and compensation of injured victims are directly implicated in this case, while none of the traditional federal concerns in providing uniform regulation of commercial maritime activity apply. In the first instance, the very location of the accident in this case underscores that the case has little or nothing to do with maritime law or admiralty. The accident occurred on an inland lake, and the record does not reflect that *any* commercial maritime activity occurs in those waters. Dale Hollow Lake technically constitutes "navigable waters" of the United States only because it encompasses an interstate border. However, there is no proof in the record that any traditional maritime activity (*i.e.*, maritime commerce) takes place on that lake, nor is there proof that any events that *do* occur on the lake, including the accident at issue in this case, could have any

potentially disruptive impact on maritime commerce. Thus, i is at the very least highly questionable whether admiralty jurisdiction could have been invoked in this case. *See, e.g.*, *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (noting that the test for admiralty jurisdiction requires that: 1) the tort occurred on navigable water; 2) the incident must have a "potentially disruptive impact on maritime commerce"; and 3) the general character of the activity giving rise to the incident must have a "substantial relationship to traditional maritime activity").[3]

But even if this case could have been heard in admiralty as a *jurisdictional* matter, from a *choice of law* perspective it is clear that the state of Illinois' interests in providing a tort remedy to the Sprietsmas outweigh any federal interest in the application of maritime law. In *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), this Court chose to apply state wrongful death law to a case involving a non-seaman's death arising from use of a recreational watercraft, despite the fact

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[3] This case is distinguishable from *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982) in which this Court determined that admiralty jurisdiction existed in a case involving a collision between two recreational watercraft. In *Foremost*, this Court emphasized that "admiralty law has traditionally been concerned with the conduct alleged to have caused this collision by virtue of its 'navigational rules--rules that govern the manner and direction those vessels may rightly move upon the waters.'" 457 U.S. at 675 (quoting *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 270 (1972)). Admiralty law's concern with navigational rules anchored the result in *Foremost*, because that case involved a collision between two watercraft. Here, by contrast, the decedent's injury involved only a single boat, and admiralty's rules of navigation cannot be implicated.

that the case was governed by admiralty jurisdiction. There, this Court stressed that "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters." 516 U.S. at 215 n.13 (internal citations omitted). Moreover, longstanding tradition among admiralty courts provides that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Id.* at 213 (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970)).

Most importantly, this Court recognized in *Yamaha* that "uniformity concerns" that had pervaded prior decisions to apply federal law in the maritime context simply were of much less significance in the context of a claim involving a "nonseafarer" – that is, someone covered by neither the Jones Act, 46 U.S.C. § 688, nor the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* – in state territorial waters. Because Congress had not enacted any comprehensive statutory tort recovery scheme to address such claims, this Court held that it was appropriate to apply a state law remedy in those circumstances. 516 U.S. at 215-16. In other words, in the absence of a comprehensive federal remedial scheme, this Court has held and should continue to hold that, even in an admiralty case, a state's interests in providing a compensatory remedy outweigh any federal interest in uniformity, especially when "uniformity" would result in the utter lack of a remedy.

Just as in *Yamaha*, Mr. Sprietsma's claims here involve an injury to a nonseafarer in state territorial waters. As stated above, neither the Boat Safety Act, the Jones Act, nor any other federal statutory scheme provide any remedy for these claims. Under *Yamaha*, it is clear that in these circumstances the federalism interests of states in providing a remedy trump any countervailing concerns regarding the uniformity of maritime law. Thus, the lower court's decision in this case to jettison the

presumption against preemption not only ignored this Court's decision in *Yamaha* – it effectively turned the *Yamaha* analysis on its head. This Court should take this opportunity to correct the lower Court's misunderstanding of the relative importance of state and federal interests by restoring the presumption against preemption.

Finally, *amici* note that the lower court's over-reliance on the traditional role of the federal government in regulating admiralty law here is even more troubling in light of recent admiralty scholarship that has called into serious question the constitutional foundation for federal preemption in the context of admiralty law. *See, e.g.*, Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L.R. 273 (1999)(hereinafter "*Preemption at Sea*") and Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS L.J. 1349 (1999)

Moreover, even scholars who have generally defended the necessity for federal uniformity in the maritime context have criticized any notion that federal law should be applied in contexts similar to those at bar. *See* Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. L. & COM. 517, 541 (2001) ("If we continue to extend substantive maritime law to situations in which no national interest is clearly implicated, and if we continue to displace state law in situations where, by contrast, there is a clearly discernible state interest, we risk the undoing of the general maritime law as we know it, and as we need it"). Thus:

> there should be a presumption in favor of state governance. Although the familiar presumption against preemption operates primarily to ensure that Congress – in which the states are

> represented – retains responsibility for preemption decisions, it also reflects a more basic judgment that state regulatory authority should be disturbed only in exceptional circumstances. This is in keeping with Madison's insight that the ultimate survival of the federal system turns on the ability of state governments to retain the loyalty of the people by using state regulatory powers to supply their most basic needs and wants. State law should yield, therefore, only to a strong countervailing federal maritime policy.

Preemption at Sea, 67 Geo. Wash. L.R. at 357.

In short, the invocation by the court below of the federal role in regulating maritime law was particularly misplaced in the factual context of this case, especially in light of this Court's recent jurisprudence and the scholarship calling for a complete rethinking of the role of federalism in the admiralty setting.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR OF THE ESTATE OF JEAN SPRIETSMA,

Petitioner,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the Illinois Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 123 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to this brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed an *amicus* brief in this case in the Illinois Supreme Court. Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether federal law preempts a state-law tort claim that outboard motors lacking propeller guards are defective. "Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure or purpose." *FMC Corp.* v. *Holliday*, 498 U.S.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than PLAC or its members or counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

52, 56-57 (1990) (internal quotation marks omitted). Because Congress included an express preemption clause in the Boat Safety Act of 1971 ("BSA" or "Act"), 46 U.S.C. § 4306, congressional intent to supersede state and local authority in the area of recreational boat safety is undeniable. The only dispute is over the *extent* of preemption.

As we explain below, the broad language of the BSA's preemption clause easily resolves the disagreement in respondent's favor. Petitioner's propeller guard claim seeks to impose a "requirement" or "standard" under state "law" on the "associated equipment" of a "recreational vessel" (46 U.S.C. § 4306): the requirement that outboard motors include propeller guards. As the Coast Guard recognizes, this *very same requirement* in a state statute would be "categorically" preempted by the BSA – preempted even if the Coast Guard never took *any* action concerning a federal propeller guard requirement (much less the outright rejection of such a requirement that actually occurred). U.S. Br. 9, 19; J.A. 97. The so-called "savings" clause, 46 U.S.C. § 4311(g), does not limit express preemption under Section 4306. Rather, the purpose of Section 4311(g) is to exempt all "liability at common law or under State law" that survives preemption under Section 4306 from the specified *affirmative defense* of compliance with Coast Guard standards, requirements, or orders. Nothing in *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000), requires a different result.

Petitioner's claim is also impliedly preempted. In the absence of express preemption, the Supremacy Clause ensures that "state law that conflicts with federal law is 'without effect.'" *Cipollone* v. *Liggett Group*, 505 U.S. 504, 516 (1992) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)). State law conflicts with federal law if it becomes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Petitioner's claim that state law requires propeller guards – a device that the Coast Guard refused to require on the strength of a detailed administrative record showing that propeller guards had unacceptable safety risks – frustrates the fundamental purposes of the BSA.

Before addressing these issues of express and implied preemption, we rebut the notion – propounded by petitioner and his *amici* – that federal preemption of state law involving nationally distributed products is unusual, disfavored, or contrary to principles of federalism.[2]

ARGUMENT

I. CONGRESS OFTEN REMOVES OBSTACLES TO A UNIFIED NATIONAL MARKETPLACE BY PREEMPTING DIVERGENT STATE AND LOCAL LAWS CONCERNING NATIONALLY DISTRIBUTED PRODUCTS

From the briefs submitted by petitioner and his *amici*, one might think that this case implicates "critical safeguard[s] of federalism" (States' *Amicus* Br. 2) and "has enormous implications" (Pet. Br. 2) for state authority over matters of health, safety, and welfare. In fact, federal preemption of state and local law is well-accepted, routine, and exceedingly common. Congress has repeatedly exercised its broad power over interstate commerce to preempt state and local authority – especially in the areas of state and local efforts to regulate nationally distributed products or the instrumentalities of interstate commerce.

Federal preemption of state law is a necessary incident of the Supremacy Clause. U.S. Const. art. VI, cl. 2. By "direct

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[2] Respondent has argued extensively (and the lower court determined) that this is an admiralty case governed by maritime law. If this Court were to agree with that submission, it would not be necessary to reach any issue of preemption here. PLAC agrees with respondent that federal maritime law could not be construed to require imposition of propeller guards by juries in fifty States when Congress has enacted a statute calling for expert and uniform administrative resolution of such issues, and the Coast Guard has refused to require propeller guards based on a determination that they do not satisfy the standards set forth in the BSA.

operation of the Supremacy Clause," States are precluded from taking any actions inconsistent with federal law. *Brown* v. *Hotel and Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984). Moreover, congressional power over a subject under the Commerce Clause allows *complete preemption* of state authority. See *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Commerce Clause power includes authority to preempt multifarious or conflicting state and local requirements that Congress finds detrimental to the national economy or otherwise undesirable. It also includes the authority to decide that particular aspects of interstate commerce should remain *unregulated* by federal, state, or local law. See *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983).

A wide array of federal statutes expressly preempt state and local law.[3] Many of these statutes involve products that are distributed nationally. Congress's desire for greater uniformity in requirements applicable to nationally distributed products is

[3] These include the Federal Election Campaign Act, 2 U.S.C. § 453; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; the Packers and Stockyard Act, *id.* § 228c; the Agricultural Marketing Act, *id.* § 1626h; the Food Security Act, *id.* § 4817; the Plant Protection Act, *id.* § 7756; the Flammable Fabrics Act, 15 U.S.C. § 1203(a); the Federal Hazardous Substances Act, *id.* § 1261 note; the Child Safety Protection Act, *id.* § 1278 note; the Federal Cigarette Labeling and Advertising Act, *id.* § 1334; the Fair Packaging and Labeling Act, *id.* § 1461; the Poison Prevention Packaging Act, *id.* § 1476(a); the Consumer Product Safety Act, *id.* § 2075(a); the Magnuson-Moss Warranty Act, *id.* § 2311(c); the Nutritional Education and Labeling Act, 21 U.S.C. § 343-1; the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a); the Poultry Products Inspection Act, *id.* § 467e; the Federal Meat Inspection Act, *id.* § 678; the Egg Products Inspection Act, *id.* § 1052; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Employee Retirement Income Security Act, *id.* § 1144(a); and, of course, the Boat Safety Act, 46 U.S.C. § 4306. See also note 4, *infra*.

understandable. For example, in enacting the many express preemption clauses that supersede state requirements relating to product labeling, Congress has determined that particular products should have uniform national warnings. Without a guarantee of uniformity, manufacturers serving the national market could be required to use different warnings in every State – creating precisely the sort of inefficiencies and conflicts against which the Commerce Clause was directed. Without uniformity enforced through federal preemption, inconsistent state warning requirements could preclude sale of the same product nationwide. Even without a direct conflict, manufacturers would have to continuously update and change labeling in response to regulators – and juries – in fifty States.

But the practical difficulties that attend multifarious product *labeling* requirements pale in comparison to the mischief that divergent design requirements would cause – particularly design requirements applicable to permanent aspects of a product that can be used to travel among different States (such as the design of a boat hull). Thus Congress has frequently chosen to supersede state requirements targeting the channels or *instrumentalities* of interstate commerce (or things that regularly and foreseeably move in interstate commerce). See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). Examples include preemptive federal statutes applicable to automobiles, trucks, airplanes, and of course boats.[4] In *Southern Ry.* v. *Railroad Comm'n*, 236 U.S. 439 (1915), this Court held that Congress preempted the *entire field* of freight car safety equipment intended for the protection of employees. Preemptive statutes governing railroads include

[4] In addition to the BSA and the Ports and Waterways Safety Act (see *United States* v. *Locke*, 529 U.S. 89, 110-12 (2000)), these include the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5125; the Federal Aviation Administration Authorization Act, *id.* § 14501(c); the National Traffic and Motor Vehicle Safety Act, *id.* § 30103(b)(1); the Surface Transportation Assistance Act, *id.* § 31114(a); the General Aviation Revitalization Act, *id.* § 40101 note; and the Airline Deregulation Act, *id.* § 41713(b).

the Federal Railroad Safety Act, 49 U.S.C. § 20103(a), and the Safety Appliance Acts, 49 U.S.C. §§ 20301-20306.

This case fits comfortably within *both* of these established areas of federal preemption. Recreational boats (and boating equipment) are consumer products sold and distributed in a nationwide market. At the same time, boats are mobile and frequently travel between States or along a state border. The mobility of recreational boats presents the same sort of intractable difficulties with divergent state and local design requirements that railroads once experienced with railroad cars. A manufacturer such as respondent that sells an outboard motor in Rhode Island cannot prevent the equipment from eventually being used in Florida, Michigan, California, or even Hawaii.

Nor is this all. Federal superintendence and preemption are particularly appropriate here because, as respondent has shown, the accident in this case occurred on a navigable interstate waterway. Petitioner's claim is accordingly governed by *federal* maritime law. In passing the Boat Safety Act, Congress explained that "federal preemption in the issuance of boat and equipment safety standards * * * conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce." S. Rep. No. 92-248, 92d Cong., 1st Sess. 20 (1971) ("Senate Report").[5] For maritime reasons as well, the existence of preemptive federal safety requirements under the BSA should surprise no one.

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[5] Analogously, the Federal Aviation Act provides that the "United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a); see also *Northwest Airlines* v. *State of Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (noting that Commerce Clause "lift[s] the navigable waters of the United States out of local controls and into the domain of federal control" and that "[a]ir as an element in which to navigate" is also "inevitably federalized").

In recent years, this Court has repeatedly addressed whether Congress's express preemption of state "requirements," "standards," and "laws" includes common-law requirements and standards, particularly those of state tort law. On every occasion, the Association of Trial Lawyers of America ("ATLA") has urged this Court to distinguish between common law and statutory duties – despite the obvious anomalies that distinction would create given the codification of common-law tort doctrines in many States. Not surprisingly, ATLA (and petitioner) recycle those arguments here. See ATLA *Amicus* Br. 2-3, 17 (suggesting that "product liability law" does not impose "state requirements"); Pet. Br. 25-28.

Majorities of this Court have repeatedly rejected these arguments as contrary to English usage and common sense.[6] The Court has long recognized that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). The idea that massive common-law liability for a design defect does not "require" any future action by a product manufacturer ignores practical realities. A manufacturer that ignored a multimillion-dollar verdict in a design defect case would risk not only similar verdicts but also *punitive* damages in the future.

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[6] See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 511 (1996) (concurrence and dissent) ("ordinary meaning" of provision preempting state "requirements" "*clearly* pre-empts any state common-law action") (emphasis added); *id.* at 504 (Breyer, J., concurring) (recognizing "anomalous consequences" of "grant[ing] greater power * * * to a single state jury than to state officials acting through state administrative and legislative lawmaking functions"); *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (preemption of any state "law, rule, regulation, order, or standard" includes "[l]egal duties imposed on railroads by the common law"); *Cipollone*, 505 U.S. at 521 (plurality); *id.* at 548-49.

Finally, the broader issue raised by such arguments is not federalism but separation of powers. See generally Viet Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2087-88, 2090-92 (2000). Federalism does not – and cannot – justify refusal to enforce a policy decision made by the Congress to bring greater order, efficiency, and rationality to an important area of maritime and interstate commerce by preempting divergent state and local requirements imposed on boat manufacturers. Nor does federalism authorize judicial second-guessing of Congress's judgment that certain boating safety issues are better resolved by an expert federal agency than haphazardly by lay juries in fifty States. And, of course, federalism provides no basis for declining to give effect to the Supremacy Clause by tolerating state and local laws that conflict with federal law or frustrate Congress's purposes.

II. THE BOAT SAFETY ACT EXPRESSLY PREEMPTS PETITIONER'S CLAIM

Congress enacted the Boat Safety Act of 1971, codified in part as amended at 46 U.S.C. §§ 4301-11, in order to "improve boating safety and to foster greater use, development, and enjoyment of all waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214. To further those objectives, Congress vested broad regulatory authority in the Secretary of Transportation (since delegated to the Coast Guard) "authorizing the establishment of *national* construction and performance standards for boats and associated equipment." *Ibid.* (emphasis added); see 49 C.F.R § 1.46(n)(1). See also 46 U.S.C. § 4302. Congress also declared a national policy in favor of "encourag[ing] greater and continuing *uniformity* of boating laws and regulations as among the several States and the Federal Government." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (emphasis added). The concerns that prompted Congress to provide for "national construction and performance standards for boats and associated equipment" (Senate Report at 15), are readily apparent from the legislative history – and no different

from the reasons that spurred Congress to enact many other preemption provisions targeting nationally distributed products.

A. Section 4306 Generally Preempts The Field Of Recreational Boating Safety and Performance Standards And Equipment Requirements

1. To achieve the goal of national uniformity in boat and equipment safety standards, Congress included the following provision – entitled "Federal preemption" – in the BSA:

> Unless permitted * * * under section 4305 of this title, a State or political subdivision of a State *may not establish, continue in effect, or enforce* a *law or regulation* establishing a recreational vessel or associated equipment *performance or other safety standard* or imposing a *requirement* for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) *that is not identical to a regulation prescribed under section 4302 of this title.*

46 U.S.C. § 4306 (emphasis added). Section 4305, in turn, provides that "[i]f the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter." *Id.* § 4305.

As the statutory text makes plain, Congress intended to bring about broad federal preemption of state and local laws in the field of performance and safety standards for boats and associated equipment. Under Section 4306, States are generally precluded from "establish[ing]," or "continu[ing] in effect," or even "enforc[ing]," any "law or regulation" that establishes a boat performance or safety standard or imposes a "requirement" on "associated equipment" – unless the state law is "identical" to a regulation that has been "prescribed" by the Coast Guard "under section 4302." Thus, until the Coast Guard has acted by issuing a national design or construction requirement, the States

are generally ousted from the entire field of design and construction standards. Accord U.S. Br. 11.

Section 4306, however, contains two carefully drawn exceptions to this broad preemptive command. First, it permits the Coast Guard to grant an exemption from preemption pursuant to Section 4305 if the agency makes a determination that "recreational vessel safety will not be adversely affected." 46 U.S.C. § 4305.[7] Second, Section 4306 includes an exception – applicable "in the absence of the [Coast Guard's] disapproval" – for state and local laws that "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." *Id.* § 4306. The Coast Guard's "right of disapproval" is intended "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." Senate Report at 20. Notably, both of these exceptions remain under the ultimate control of the Coast Guard, the expert federal agency charged with formulating uniform national design and construction requirements.

Once the Coast Guard has acted by establishing national design requirements, the States remain free to enact or to enforce requirements that mirror the federal requirements. As the Senate Report accompanying the BSA noted, "the very magnitude of the boating safety problem * * * suggests that an effective program of education, enforcement, and assistance must actively involve the States." Senate Report at 13. In addition to carving out a role for the States in enforcement and education, the Act also "does not preempt state law or regulation directed

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[7] The Coast Guard has indicated that exemptions must be consistent not only with public safety but also with the needs of interstate commerce and interstate boating traffic (and with all of the purposes underlying the BSA). 44 Fed. Reg. 21109-21110 (1979). And "no exemption will be granted for any requirement that would compel substantial alteration" of an existing boat or item of boating equipment unless the applicant demonstrates "a substantial risk of personal injury to the boating public." *Id.* at 21110.

at safe boat *operation and use*, which was felt to be appropriately within the purview of state or local concern." *Id.* at 20.[8]

Petitioner's claim falls squarely within the domain of state law expressly preempted by Section 4306. Petitioner's complaint alleges that respondent's outboard motor was defective for lack of a propeller guard. J.A. 100-110. The statute expressly reaches not only all "performance or other safety standard[s]" imposed under any state or local "law or regulation" on recreational vessels, but also any "requirement" imposed on "equipment" that is "associated" with a "recreational vessel." 46 U.S.C. § 4306. No one disputes that a propeller guard falls within this language. As the Coast Guard has itself recognized, Section 4306 operates to "categorically preclude[] the States from adopting" a "propeller guard requirement" through any "statute or regulation." U.S. Br. 12; see J.A. 97.

Moreover, petitioner is seeking, through this lawsuit, to impose a performance and safety standard – as well as a requirement – on respondent and its product: the requirement that the outboard motor include a propeller guard. The rule of state law requiring propeller guards that petitioner seeks to "establish, continue in effect, or enforce" is also plainly "not identical to" any Coast Guard regulation. Nor is there any suggestion here that the propeller guard petitioner alleges should have been provided was needed to "meet uniquely hazardous conditions

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[8] Congress's recognition of these areas of state authority further refutes the submission of the state *amici* (Br. 2) that preemption here would upset "the appropriate balance of authority between the States and the federal government." Not only did Congress expressly *recognize* the role of the States in such areas as education and enforcement, it also *provided for* state input into the process of formulating uniform federal design standards. Under the BSA, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("NBSAC"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety. Fully one-third of the 21 members of the NBSAC must be state officials responsible for state boat safety programs. See *id.* § 13110(b)(1).

or circumstances within the State." Accordingly, there should be no serious dispute that the broad language of Section 4306, standing alone, easily encompasses petitioner's claim.

2. With the government's support, petitioner nevertheless contends that Section 4306 should not be interpreted as expressly preempting his propeller guard claim. Except for petitioner's reliance on the so-called "savings" clause of the BSA (46 U.S.C. § 4311(g)) and on the *Geier* decision, which we discuss in detail below, these arguments are all readily dispatched.

First, petitioner (but not the government) maintains that the broad language of Section 4306 should be narrowly interpreted because of the "strong presumption against preemption" that applies to cases involving "common-law tort remedies." Pet. Br. 16; see also *id.* at 16-21. But such a presumption is inapposite to this case. As the Illinois Supreme Court correctly noted (Pet. App. 5a-6a), the Boat Safety Act implicates the "historic federal maritime jurisdiction." Senate Report at 17; see also *id.* at 20 (discussing the "long history of preemption in maritime safety matters"). In the area of "maritime commerce," there simply is "no beginning assumption that concurrent regulation by the State is a valid exercise of police powers." *United States* v. *Locke*, 529 U.S. 89. 108 (2000); see also *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (no presumption against preemption of state tort claims when regulated subject is "inherently federal in character").[9]

Second, petitioner argues that Section 4306 does not operate to preempt state law unless and until "the Coast Guard *has* prescribed a federal regulation." Pet. Br. 23. This argument

[9] Because no "presumption against preemption" applies here, this case presents no occasion to reexamine whether that "presumption" – which is of recent vintage, has been inconsistently applied, and is at odds with other doctrines of preemption law – ought to be abandoned, as PLAC has urged in recent cases. See No. 99-312 PLAC Br., *Norfolk S. Ry.* v. *Shanklin*, at 3-12; Nos. 98-1701 & -1706 PLAC Br., *United States* v. *Locke*, at 4-12.

ignores the text of Section 4306, which provides "categorically" (U.S. Br. 9) that "a State *may not* establish, continue in effect, or enforce a law or regulation" in the field of recreational vessel and equipment design "that is not identical to *a regulation prescribed under section 4302 of this title*" (46 U.S.C. § 4306 (emphasis added)). It also ignores the Coast Guard's "long-standing" view that "in the absence of a federally-promulgated standard, * * * state laws and regulations cannot be 'identical to a regulation prescribed under section 4302 of' Title 46." U.S. Br. 11.[10]

Equally mistaken is petitioner's contention that his reading is "more plausible" because "Congress merely gave the Coast Guard permissive authority" to issue federal standards and requirements. Pet. Br. 23. Congress intended the Coast Guard to prescribe all necessary boat standards. See, *e.g.*, Senate Report at 17 ("While the language of Section 5 is permissive and not mandatory, the Committee expects that initial standards will be promulgated as soon as practicable."). Moreover, there is no good reason – and certainly none apparent from the text of the statute itself – to believe that Congress intended to make its goal of uniformity contingent upon the Coast Guard's specific issuance of formal regulations.

Petitioner is wrong to say (Br. 24) that *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), or *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), lends any support to this reading. The preemption provisions in those cases were worded differently. The

[10] For precisely that reason, the Secretary of Transportation took action immediately after the BSA was passed to grant exemptions under 46 U.S.C. § 4305 temporarily — until the Coast Guard adopted federal boat construction and performance standards and equipment requirements — for all state boat safety laws, regulations, and requirements "in effect on the effective date of the Federal Boat Safety Act of 1971." 36 Fed. Reg. 15764, 15765 (1971); see also 38 Fed. Reg. 6914 (1973) (rescinding that general exemption of state laws). Under petitioner's view, these regulatory actions by the federal government were wholly unnecessary.

National Traffic and Motor Vehicle Safety Act (MVSA) preemption clause at issue in *Myrick* preempts state standards only when "'a Federal motor vehicle safety standard * * * is in effect.'" *Geier*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988 ed.)). As the Solicitor General explained in *Lewis* v. *Brunswick*, this Court in *Myrick* "based its decision" on "th[is] introductory clause * * *, which required, as a prerequisite for preemption, that a federal regulation be 'in effect' for the same aspect of performance." No. 97-288 U.S. Br. 16 n.8. But the BSA's "introductory clause is not written in a comparably limiting manner." *Ibid.* Instead, Section 4306 mandates preemption according to its terms "[u]nless" the Coast Guard grants an exemption. 46 U.S.C. § 4306. The preemption clause at issue in *Medtronic* is also phrased differently. See 21 U.S.C. § 360k(a)(1) (preempting state requirements that are "different from, or in addition to" federal requirements that are "applicable under this chapter to the device"). And in contrast to the BSA's preemption clause, Section 360k(a) has long been interpreted by the administering agency as having preemptive effect only where a federal requirement is already in place. 21 C.F.R. § 808.1(d); 43 Fed. Reg. 18661, 18662 (1978).

Third, petitioner argues (Br. 25) that Section 4306's reference to any state or local "law or regulation" that imposes a safety or performance "standard" – as well as to any "requirement" imposed on "associated equipment" – does not include "common law claims." The government appears to agree. U.S. Br. 13 n.3 (suggesting that the "most natural reading" of this language would limit its applicability to "a standard prescribed in advance by legislative or administrative authorities").[11] The

[11] According to the government, its narrow interpretation of Section 4306 finds support in "the fact that the FBSA also uses the term 'standards' to describe the 'regulations' issued by the Secretary, which are prescriptive in nature and do not encompass common-law or other damages liability." U.S. Br. 13-14 n.3. That same argument was made, and necessarily rejected, in *Medtronic* – a result urged by the Solicitor General. See Nos. 95-754 & 95-886 U.S. Br. 16-17.

argument that common law is different, however, is squarely foreclosed by this Court's decisions. See note 6, *supra*.

Fourth, petitioner argues (Br. 27-28) that common-law requirements are not "establish[ed], continue[d] in effect, or "enforce[d]" by a "State or political subdivision of a State." 46 U.S.C. § 4306. An identical argument was rejected in *Medtronic*, which involved a preemption clause that applies to any "State or political subdivision of a State" and preempts any effort to "establish or continue in effect" state requirements. See also *Easterwood*, 507 U.S. at 664 (common-law claims covered by preemption provision referring to "laws" that States may "adopt or continue in force"). The phrase "State or political subdivision of a State" plainly includes all organs of state government, including the judicial branch. See *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (jury is a "quintessential governmental body"); *Ex Parte Virginia*, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive, or its judicial authorities.").

B. Petitioner's Reliance On The "Savings" Clause And On *Geier* Is Misplaced

In contending that there is no express preemption in this case, both petitioner and the United States rely principally on 46 U.S.C. § 4311(g), which provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

According to petitioner, this provision – which he describes as an "*anti*-preemption" clause (Br. 28) – categorically "saves" from preemption under Section 4306 "all common-law claims" and indeed all "forms of damages liability" under state law. *Id.* at 28, 30 & n.11.

In the alternative, petitioner (now joined by the United States) argues that, even if Section 4311(g) does not "save" petitioner's claim from express preemption, it nevertheless sheds light on the proper interpretation of Section 4306. See

Pet. Br. 22, 29-30; U.S. Br. 12-13. This is necessarily an *alternative* argument because, if Section 4306 does not reach common law claims in the first place, it would not be possible for Section 4311(g) to "save" such claims from express preemption. In advancing this second argument, petitioner and the United States rely substantially on *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000). As we explain below, neither argument based on Section 4311(g) and *Geier* has any merit.

1. Section 4311(g) "Saves" Nothing From Preemption Under Section 4306

American tort law has long recognized the "important distinction" between: (1) regulatory compliance as an affirmative defense to common-law and other tort liability, and (2) federal preemption of state law. RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY § 4, cmt. e (1998) ("RESTATEMENT (THIRD)"). As the American Law Institute has explained (*ibid.*):

> When a court concludes that a defendant is not liable by reason of having complied with safety design or warnings statutes or regulation, it is deciding [as a matter of state law] that the product in question is *not defective as a matter of the law of that state*. * * * In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to *displace state law*, including state tort law, with a federal statute or regulation. * * * [A] determination that there is preemption *nullifies otherwise operational state law*.

See also RESTATEMENT (SECOND) OF TORTS § 288C (1965). The compliance-with-government-standards defense is a close cousin of the tort-law doctrine under which *noncompliance* with a relevant safety standard is sometimes regarded as negligence *per se*. See RESTATEMENT (THIRD) § 4, cmt. d.

In *Geier*, the majority acknowledged this important distinction between preemption and the compliance defense in examining the meaning of a "savings" provision in the MVSA (15

U.S.C. § 1397(k) (1988 ed.)). Significantly, the Court in *Geier* did *not* hold that the MVSA's "savings" clause operated by its own force to "save" common-law claims from preemption under the MVSA's express preemption clause (*id.* § 1392(d)). Instead, the Court relied on the "savings" clause only indirectly, as a reason why the preemption clause of that statute must be interpreted to exclude "standards" imposed through common-law actions. See *Geier*, 529 U.S. at 867-68. "Without the savings clause," the Court explained, "it is possible to read the preemption provision, standing alone, as applying to standards imposed in common-law tort actions." *Ibid.* But if that reading were accepted, "few, if any, state tort actions would remain for the savings clause to save." *Ibid.* To preserve some meaningful function for the "savings" clause, the Court interpreted the MVSA's preemption clause narrowly as excluding "standards" imposed though common-law actions.

The Court in *Geier* went on, moreover, to squarely *reject* the argument that the "savings" clause operated to "save" common law claims from any form of *implied* preemption. 529 U.S. at 869-74. In so doing, the Court acknowledged that the language of the MVSA "savings" clause did not appear to be aimed at saving state-law tort actions *from preemption*. Invoking the RESTATEMENT (THIRD) and the well-established distinction "between state-law compliance defense and a federal claim of pre-emption," the Court explained:

> The words "[c]ompliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), *sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law*, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one.

Geier, 529 U.S. at 869-70 (emphasis added). "It is difficult to understand," the Court reasoned, "why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to 'save'

all state-law tort actions * * *." *Id.* at 870. Nor could such a precondition be reconciled with an intent on Congress's part to "save" from implied preemption conflicting state standards imposed by the common law.

Even more than the "savings" clause at issue in *Geier*, Section 4311(g) is couched in language that "sound[s] as if [it] simply bar[s] a special kind of defense, namely, a defense that compliance with a federal standard automatically" excuses "a defendant from state law." *Geier*, 529 U.S. at 869. Not only does Section 4311(g) similarly refer to "compliance" with federal standards, but it provides that such compliance will not "*relieve* a person from liability at common law or State law" – language that suggests an intent merely to preclude the avoidance of liability through an affirmative defense.

The legislative history of the BSA confirms that Section 4311(g) relates to the compliance defense and not at all to federal preemption. As the Senate Report explained, Section 4311(g)'s "purpose * * * [wa]s to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act will not be a *complete defense* to liability." Senate Report at 32 (emphasis added).[12] See also *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong. 1st Sess. 66 (1971) ("Senate Hearing") (statement of Admiral Chester R. Bender) ("we would have no objection to * * * clarify[ing] that a manufacturer's compliance with promulgated standards does not by itself relieve him of any tort *liability which otherwise could pertain*") (emphasis added). During the House debate, one Member aptly described Section

[12] Tellingly, the Senate Report goes on to state that "depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value." Senate Report at 32. If Section 4311(g) were addressed to federal preemption, there would have been no reason for Congress to be concerned with the admissibility of a manufacturer's compliance.

4311(g) as a "technical amendmen[t]." 117 Cong. Rec. 28036 (1971) (statement of Rep. Grover).

At least four other features of Section 4311(g) and the BSA confirm that the "savings" clause was not designed to limit the scope of federal preemption under Section 4306 at all. *First*, Section 4311(g) is *not limited* to preemptive federal design and construction standards issued by the Coast Guard pursuant to 46 U.S.C. § 4302. Instead, it broadly covers "compliance" with "this chapter" [Chapter 43, 46 U.S.C. §§ 4301-4311] as well as with any "standards, regulations, or orders prescribed under this chapter." *Id.* § 4311(g).[13] Insofar as Section 4311(g) applies to federal "regulations" or "orders" that are *not preemptive* in nature (or even to Chapter 43 in its entirety), its function *cannot be* to spare state requirements from preemption under Section 4306.[14] Thus, *at least in part*, Section 4311(g) must concern the affirmative defense of compliance with federal requirements.

Second, Congress included *in Section 4306 itself* a specific exception to preemption for state and local requirements con-

[13] The reference to "this chapter" makes sense in light of another provision of the BSA authorizing the Coast Guard to "require or permit the display of seals * * * certifying or evidencing compliance with Federal safety regulations and standards for boats and associated equipment." Pub. L. No. 92-75, § 7, 85 Stat. 213, 216 (1971) (codified as amended at 46 U.S.C. § 4302(a)(3)). Congress may well have anticipated that an *operator* of a recreational boat accused of negligence in a boating accident might invoke compliance with all Coast Guard standards as an affirmative defense to a claim that the operator should have been carrying additional safety equipment on board. See also *Creppel* v. *Geco-Prakla, Inc.*, 1994 WL 50241 (E.D. La. Feb. 11, 1994) (rejecting absolute compliance defense asserted by oil company in maritime trespass action).

[14] The BSA included a provision (entitled "general regulations") that authorized the Coast Guard to issue regulations "necessary or appropriate to carry out the purposes of this Act." Pub. L. No. 92-75, § 39, 85 Stat. 213, 228 (1971). That provision is now codified at 46 U.S.C. § 13109(c).

cerning "the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State."

Third and relatedly, Congress's placement of Section 4311(g) – Section 40 of the original BSA – at the very end of the Act, far removed from the express preemption provision (Section 10 of the Act), further indicates that the "savings" clause was directed at the entire Act rather than at a single provision placed much earlier. Compare 46 U.S.C. § 4305 (exemption provision placed immediately before Section 4306).

Fourth, Section 4311(g) provides that compliance with federal requirements "does not relieve a person from liability at common law *or under State law*." 46 U.S.C. § 4311(g) (emphasis added). If petitioner were correct that this language spares state requirements from preemption, it would operate to spare not just state "common law" but *all* "State law." That, in turn, would have the effect of eviscerating the BSA's express preemption clause (hardly the "technical amendment" of the House debate). In numerous other cases, this Court has refused to interpret a general "savings" clause in a manner that would cause a federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).[15]

Seeking to avoid this difficulty, petitioner and the United States advance a novel interpretation of the "savings" clause. They maintain that Section 4311(g)'s broad reference to "liability at common law *or under State law*" covers only "state statutes * * * that authorize *private* suits for *money damages*, but not * * * state prescriptive laws and regulations." U.S. Br. 13 n.2 (emphasis added); Pet. Br. 30 & n.11 (same). Congress, however, included no such words of limitation in Section 4311(g). The Congress that drafted the BSA knew how to create

[15] See also *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-91 (1992); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

an exemption for damages liability – and did so in another provision of the BSA. See Pub. L. No. 92-75, § 16, 85 Stat. 220 (creating federal "good samaritan" duty on the part of operator of a vessel involved in a collision or accident to render certain assistance to other "persons affected"; and providing that any person who complies with this duty "shall not be held liable *for any civil damages* as a result of the rendering of [such] assistance") (emphasis added); see also 46 U.S.C. § 2303(c) (current codification of § 16: individual who renders such assistance "is not liable for damages").

Petitioner's reading would also lead to perverse consequences. Under petitioner's view, Section 4311(g) would "save" from express preemption under Section 4306 a state propeller guard requirement imposed though a tort lawsuit that resulted in a multimillion-dollar exaction of punitive damages, while at the same time nullifying and superseding a local ordinance requiring propeller guards but imposing only a modest sanction for violations. Why would Congress have wished to create such a curious form of express preemption?

For all of the foregoing reasons, this Court should conclude that Section 4311(g) has *nothing to do with preemption* and instead relates exclusively to the compliance-with-government-standards defense. Finally it should be added that Congress knows full well how to draft a true "anti-preemption" provision. It has done so many times.[16] Congress is also fully capable of drafting exceptions to statutory commands of express preemp-

[16] See, *e.g.*, 7 U.S.C. § 2910(a) ("Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State."); *id.* § 4512(a) ("Nothing in this chapter may be construed to preempt or supersede * * *"); *id.* § 6109 (same); *id.* § 6812(c) (same); *id.* § 7811(c) (same); 10 U.S.C. § 2694(d); 15 U.S.C. § 77s(c)(3)(C); *id.* § 2649(a); *id.* § 3905(d); *id.* § 6410; 16 U.S.C. § 831c-3(d); 18 U.S.C. § 922(q)(4); 20 U.S.C. § 6737(c); 42 U.S.C. § 247–4a(f); *id.* § 280g-1(d); *id.* § 604a(k); *id.* § 12113(d)(3).

tion. That is precisely what Congress did, for example, in enacting the provision at issue in *City of Columbus* v. *Ours Garage and Wrecker Service*, No. 01-419 (pending): a provision that excepts the "safety regulatory authority of a State" (49 U.S.C. § 14501(c)(2)(A)) from the scope of an express preemption provision covering all state laws relating to the "price, route, or service of any motor carrier" (*id.* § 14501(c)(1)). In fact, as noted above, *Section 4306 itself* falls into this category, because it includes a specific exception for certain state and local requirements. See also 7 U.S.C. § 6309(a); *id.* § 7756(b); 15 U.S.C. § 1203(b); *id.* § 1476(b); *id.* § 6715. Section 4311(g) bears no resemblance to either a traditional anti-preemption provision or a specific exception to preemption.

2. Section 4311(g) Provides No Basis For Interpreting Section 4306 Narrowly

Petitioner and the United States next argue that here, as in *Geier*, the "savings" clause requires this Court to read the BSA's express clause narrowly as excluding requirements imposed by state common law. That argument is incorrect.

As noted above, this Court's decision in *Geier* to interpret the express preemption provision of the MVSA as excluding common-law standards rested on the need to preserve some meaningful role for the "savings" clause involved in that case. There is no comparable risk, however, that the BSA's savings clause will be rendered meaningless. Unlike the MVSA's savings clause, the BSA's savings clause is *not* limited to "compliance" with preemptive standards and requirements issued by the federal agency.[17] As explained above, it also broadly covers

[17] The MVSA's "savings" clause is limited to "[c]ompliance" with "Federal motor vehicle safety standard[s] issued under this subchapter." 15 U.S.C. § 1397(k) (1988 ed.). Moreover, the MVSA's express preemption provision (unlike the BSA's) is triggered only once there is "'a Federal motor vehicle safety standard * * * in effect.'" *Geier*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988 ed.)). In those circumstances, the Court was faced with the question of what role the MVSA "savings" clause would retain if common-law standards were covered by the express preemption clause. Because the MVSA's preemption clause preempts all nonidentical state standards, the operation of the "savings" clause would have been limited (under the manufacturer's reading of the statute) to cases in which plaintiffs were seeking to impose a standard under state law that was identical to the federal standard.

compliance with "this chapter" [Chapter 43, 46 U.S.C. §§ 4301-4311] as well as with any "standards, regulations, or orders prescribed under this chapter." *Id.* § 4311(g). Thus, in all manner of proceedings that do *not* involve boat and equipment design and construction requirements, the savings clause precludes defendants from relying on compliance with federal standards as a defense to liability. See note 13, *supra*.

In other settings as well, Section 4311(g) would continue to play a meaningful role. *First*, it would foreclose the complete defense of compliance in any case where the Coast Guard has issued an exemption from preemption with respect to one of its design or construction standards. This is not a mere hypothetical possibility. As explained above, the Coast Guard issued a *blanket* exemption from preemption for the first two years following the BSA's enactment. During that entire period of time, the "savings" clause played a meaningful role in all cases involving design and construction standards that had been imposed by federal law. Nor is this an isolated occurrence. See, *e.g.*, 33 C.F.R. § 175.5 (exempting from preemption certain state-law requirements relating to the wearing or carriage of personal flotation devices).

Second, the "savings" clause in Section 4311(g) retains meaning in cases that fall within Section 4306's exception for state regulation of "the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. § 4306. Under that exception, for example, state law could impose negligence liability on the operator of a boat who complied fully with federal requirements relating

to the carrying and use of visual distress signals (see 33 C.F.R. §§ 175.110, 175.130), where local conditions (such as the prevalence of thick fog) necessitated the carrying of more powerful flares and other visual distress devices. In such a case, Section 4311(g) would also serve a meaningful role.

The essential rationale for the Court's narrow construction of the MVSA's preemption clause in *Geier* is accordingly absent from this case. What is more, the language of Section 4306 is broader than that of the MVSA's preemption clause, which referred solely to state "standards." In contrast, Section 4306 refers more expansively to any state or local "law or regulation" that imposes a safety or performance "standard" – as well as to any "requirement" imposed by state law on "associated equipment." In *Geier*, the Court observed that it was "possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions," but concluded that it "need not determine the precise significance of the use of the word 'standard[.]'" 529 U.S. at 868. In this case, the language of Section 4306 admits of no ambiguity, especially in light of this Court's decisions in *Medtronic*, *Easterwood*, and *Cipollone*. See note 6, *supra*.

III. PETITIONER'S CLAIM IS ALSO IMPLIEDLY PREEMPTED

Regardless of the scope of Sections 4306, petitioner's propeller guard claim is impliedly preempted. Congress gave the Coast Guard plenary authority over the issuance of uniform national boat design and construction standards and equipment requirements. After a thorough investigation, the Coast Guard decided that there should be no propeller guard requirement for recreational boats. That determination, moreover, was based on an underlying report that had concluded, at least in part, that the use of propeller guards would create serious safety hazards for recreational boaters and swimmers alike. It would frustrate the purposes of this comprehensive federal scheme to allow state lay juries, on an ad hoc basis, to second-guess the expert federal agency and impose just such a requirement.

A. The Safety Risks Of Propeller Guards Identified By The Propeller Guard Subcommittee Are Serious

In the late 1980s, the Coast Guard considered requiring manufacturers to install propeller guards on their boat engines. Among other things, the agency asked an advisory body, the NBSAC (see note 8, *supra*), to "[r]eview the available data on the prevention of propeller-strike accidents" and "[a]ssess the arguments for and against some form of mechanical guard to protect against propeller strikes." J.A. 43. The Coast Guard also asked the NBSAC to evaluate several different "propeller guard designs" and determine whether there should be "a federal requirement for some form of propeller guard." *Id.* at 43-44. This charge was fully consistent with the standards Congress has directed the Coast Guard to apply in determining what safety standards and requirements to impose. See 46 U.S.C. § 4302(c)(1), (2), (4) (requiring Coast Guard to consult with NBSAC and to consider various factors and data).

In response, the NBSAC established a Propeller Guard Subcommittee to evaluate the issue after gathering information from a wide array of private and public sources. J.A. 12. The Subcommittee conducted an exhaustive review spanning 18 months, including an investigation of the causes and overall risk of injury or death as a consequence of propeller strikes. Evidence produced to the Subcommittee indicated that "boating fatalities" involving people who are struck by either the "boat or propeller" amounted to approximately 49 deaths each year. *Id.* at 61-62. But because "the propeller itself is the sole factor in only a minority of impacts" (*id.* at 72), the number of fatal accidents attributable to propeller strikes is much lower. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at 62.

The Subcommittee also determined that other factors play a role in the small number of accidents each year involving propeller strikes. In particular, "[o]perator inexperience, incompetence, negligence, and alcoholic intake are significant contributing factors in reported 'propeller strikes[.]'" J.A. 25.

Passengers may be ejected from a boat (and then struck by a propeller) if they are "improperly seated," or as a result of a collision, or during sudden deceleration, "sharp turns," or "wave or wake bounces." *Ibid.* In addition, the 20% of all propeller strikes that occur at idling or slow speeds (below 10 m.p.h.) involve people who are operating boats "in the vicinity of swimmers" or are "in the process of picking up a fallen water skier," and include situations where the operator "inadvertently put[s] an engine in gear when swimmers are using a boarding ladder or platform." *Ibid.*

The Subcommittee also investigated the biomechanical aspects of underwater impacts and the mechanical and hydrodynamic effects of various propeller guard designs on safe boat operation. The Subcommittee made the following findings with respect to the physics of underwater impacts:

> The density of water is approximately 830 times that of air. The density of the human body is approximately the same as water. Therefore, it follows that a human body immersed in water cannot move independently of the water around it. The result of an object striking a human body in water is that the body absorbs most of the energy of the striking object. * * * The resistance force on body movement in water at 1 mile per hour is the same as a force of 29 mph in the air. It was repeatedly stated that a skull impact at 10 mph or more in water would be generally fatal. A glancing head blow twisting the neck could result in a sheared neck at such speeds * * * .

J.A. 32-33. Both "mask" and "ring-type" guards, the Subcommittee explained, significantly increase the "underwater profile" of a boat, "thereby increasing the chances of [underwater] contact." *Id.* at 36. In like manner, the "Kort nozzle, or tunnel" form of guard "substitute[s] impact for propeller cut hazard." *Id.* at 37. Because propeller guards "increase significantly the potential impact area," they "present the additional hazard of blunt trauma injuries, which are often more severe" than the "cutting wounds" caused by a propeller impact. *Id.* at 34.

The hydrodynamic effects of "mask" and "ring-type" guards were also substantial, the Subcommittee concluded, with additional negative consequences for boating safety. At speeds above 10 m.p.h. (when most propeller strikes o[illegible]ur), "both types of guards – especially the ring – affect bo[illegible] operation adversely." J.A. 37. Indeed, ring-type guards "create[] severe steering and trim effects" which, in turn, "cause serious safety and control problems" that can result in a "serious accident." *Id.* at 31. The Subcommittee noted that, in addition to these steering and handling problems, ring guards create "a new hazard" of arms and legs being "caught by the bars or ring and held against the rotating propeller." *Id.* at 36. The Subcommittee also concluded that use of propeller guards would cause some operators to develop a "false sense of security when approaching persons in the water at slow speeds, with the very real risk of impacting and/or entrapping a body appendage." *Ibid.*

In addition to outlining these safety concerns, the Subcommittee examined issues of feasibility and cost. Mask and ring-type guards, the Subcommittee concluded, are feasible only at "idling and very low speeds." J.A. 36. Fine mesh guards are "not feasible above 2-3 mph, which rules them out for recreational boating." *Ibid.* Similarly, the Kort nozzle has a "rapid loss of efficiency above 10 mph" and thus is "not operationally feasible at normal pleasure boat speeds." *Id.* at 37. All propeller guard designs, moreover, result in increased drag, loss of speed, and dramatically reduced power and fuel efficiency. *Id.* at 31-32, 37. Finally, a propeller guard "must not only fit the motor but be designed for hydrodynamic compatibility with the hull on which the motor is used." *Id.* at 38. "Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high" and "[n]o simple universal design" exists that could be used. *Ibid.* And the cost of retrofitting millions of existing boats would be "prohibitive." *Ibid.*

On the basis of this extensive factfinding, and its determination that the "use of devices such as 'propeller guards'

can * * * be counter-productive and can create new hazards of equal or greater consequence," the Subcommittee unanimously concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 39-40, 74-75. Subsequently, the full NBSAC considered the Subcommittee's report and unanimously adopted all of the Subcommittee's findings and recommendations. *Id.* at 78.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee report. J.A. 80. With respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." *Ibid.* (emphasis added).

B. Allowing Petitioner's Claim Would Frustrate The Boat Safety Act's Purposes And Place Manufacturers In An Impossible Position

Petitioner's effort to impose a propeller guard requirement through a tort lawsuit is squarely at odds with several features of the BSA, including (1) Congress's goal of uniformity in design and construction standards and equipment requirements; (2) the statutory directive that equipment requirements be formulated only by an expert agency applying specified procedures and standards; and (3) the ban on substantial alterations of existing boats. See Resp. Br. 41-47. Beyond that, however, petitioner's claim is also exceedingly difficult to reconcile with the Coast Guard's "considered decision" (U.S. Br. 9) – based as it was on a detailed report that demonstrated that propeller guards *were unsafe* – not to require propeller guards.

The contrary arguments of petitioner (and the government) largely rest on several misconceptions. First, petitioner ignores the fact that the BSA categorically preempts state and local design and construction standards and equipment requirements whether or not the Coast Guard has issued a regulation. Second, petitioner relies on a basic misapprehension of the meaning and

function of the BSA's "savings" clause. See pages 15-24, *supra*. As this Court made clear in *Geier*, however, provisions like Section 4311(g) "do *not* bar the ordinary working of conflict pre-emption principles." 529 U.S. at 869.

Once these misconceptions are set to one side, petitioner and the government are left with the argument that there is no implied preemption here because the Coast Guard did not specifically endorse or formally adopt the Subcommittee's conclusions regarding the serious safety hazards associated with propeller guards or otherwise issue a formal regulation. Here again, this argument overlooks a central feature of the BSA: it generally ousts the States from regulating in the field of design and construction safety standards and equipment requirements *even if the Coast Guard has not taken any formal action*. But what is most striking about the Solicitor General's brief is his complete failure to address *whether the Coast Guard in fact relied on safety concerns in making its decision*. The Solicitor General treats the issue as if it were purely hypothetical, bereft of real world context or consequences. Thus, he advances a variety of arguments based on a parsing of the Coast Guard's letter and argues that only a focus on the Coast Guard's "stated rationale" will adequately protect against "inadvertent" preemption of state law (even though the Coast Guard's rejection of a propeller guard was hardly "inadvertent"). U.S. Br. 23-30.

The issue, however, *does* have significant real-world implications. The Subcommittee's report firmly establishes that propeller guards give rise to serious safety hazards. Not surprisingly, courts that have examined the report and the available safety data have reached the same conclusion regarding the safety and feasibility of propeller guards. For example, in *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505, 1509 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), the court took note of evidence that "guards themselves can become a danger as they move through the water." Based on undisputed evidence, the court concluded (*ibid.* (emphasis added)):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adoption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate.*

Other courts are in agreement.[18]

Based on these authorities and the record and report developed by Subcommittee, no rational manufacturer would install propeller guards on outboard motors. Yet if this lawsuit is permitted to proceed, and it results in a jury determination of liability against respondent, respondent would face great peril – including the prospect of punitive damages in later cases – unless it installed propeller guards in the future. When it did so, however, respondent would open itself up to new lawsuits by people who have suffered the blunt traumas caused by being struck by the larger area of the propeller guard, or been injured because a propeller guard caused a boat to spin out of control, or been hit by an idling boat whose operator was lulled into a false sense of security by the presence of the guard. In all of these future cases, plaintiffs can be expected to rely heavily on the Subcommittee's data and report. Thus, the government's position in this case puts manufacturers of outboard motors in an impossible position. And it severely disserves the fundamental objective of enhancing boat safety which underlies the BSA.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

---

[18] See *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"); *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867 (8th Cir.) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"), cert. denied, 510 U.S. 815 (1993); *Fitzpatrick* v. *Madonna*, 623 A.2d 322, 325-26 (Pa. Super. 1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447, 450 (Ala. 1991).

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IN THE

Supreme Court of the United States

REX R. SPRIETSMA,
Administrator of the Estate of Jean Sprietsma,
Petitioner,

v.

MERCURY MARINE,
a Division of Brunswick Corporation,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether federal common law, applied by state and federal courts adjudicating maritime claims, should be expanded to impose a duty to install "propeller guards," where Congress has committed that issue to a federal administrative agency and the agency has refused to require installation of propeller guards.

2. Alternatively, if state common law is applicable, whether a state law propeller guard claim arising from an accident on navigable waters of the United States is preempted by the Federal Boat Safety Act.

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H.R. REP. NO. 98-388, 98th Cong., 1st Sess. (1983), *reprinted in* 1983 U.S.C.C.A.N. 924 24-25
SEN. REP. NO. 92-248, 92d Cong., 1st Sess. (1971) 9, 10, 20, 24
National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. 11, 20, 21, 23, 24

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Recreational Boat Safety: Hearings on H.R. 15041, H.R. 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries, 91st Cong., 2d Sess. 10, 11, 20, 24, 29

OTHER AUTHORITIES

James W. Bartlett, III, *Recreational Boats: The Evolution of Jurisdiction and Choice-of-Law Issues from the Constitution Through the Calhoun Decision*, 75 TUL. L. REV. 1247 (2001) 13
Lizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide Than Southern Pacific Co. v. Jensen?*, 21 TUL. MAR. L.J. 53 (1996) 25
David P. Currie, *Federalism and Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158 25
Robert Force, *Choice of Law in Admiralty Cases: "National Interests" And The Admiralty Clause*, 75 TUL. L. REV. 1421 (2001) 18, 26
Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. LAW & COMM. 517 (2001) 25, 28
Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367 (1999) 7, 8, 26
Robert Force, *U.S. Tort Law Problems, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 191 (William A. Lovett ed., 1996) 14

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GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975)	7, 8
Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Law*, 28 U. BALT. L. REV. 423 (1999)	26
Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349 (1999)	28
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BRIEF *AMICUS CURIAE* OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF RESPONDENT

The Maritime Law Association of the United States (the "MLA") respectfully files this brief *amicus curiae* in support of Respondent, Mercury Marine, a Division of Brunswick Corporation ("Respondent"), and asks this Court to affirm the decision of the Supreme Court of Illinois.[1] Petitioner, Rex R. Sprietsma, Administrator of the Estate of Jean Sprietsma ("Petitioner"), and Respondent have consented, in writing, to the filing of this brief. The MLA has filed the parties' written consents with the Clerk of this Court pursuant to Rule 37.3 of this Court.

NATURE OF THE MLA'S INTEREST

The MLA is a national bar association that was founded in 1899. The MLA's membership includes more than 3,200 lawyers, law professors, judges, and others whose professions and interests involve maritime affairs. The attorney members of the MLA, most of whom are specialists in maritime law, represent all maritime interests, including shipowners, charterers, cargo interests, port authorities, seaman, longshoremen, passengers, underwriters, manufacturers, and other maritime claimants and defendants.

The Articles of Incorporation of the MLA define its purpose as follows:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to

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[1] In accordance with Rule 37.6 of the Supreme Court of the United States, no counsel for any of the parties authored this brief in whole or in part. Likewise, no person or entity, other than the MLA, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

> furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

In 1975, the MLA passed a resolution asserting that the MLA "considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States." A subsequent MLA resolution, in 1986, reaffirmed its "support of the importance of maintaining national uniformity in maritime law."

To further these objectives, the MLA has appeared as an *amicus curiae* before this Court, on a number of occasions, to argue in favor of uniformity in the substance and application of maritime law.[2] The MLA has also sponsored a wide-range of legislation dealing with maritime matters[3] and has cooperated with congressional committees in the formulation of other maritime legislation.[4] Similarly, the MLA has

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[2] *E.g.*, *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

[3] *E.g.*, Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315, Death on the High Seas Act, 46 U.S.C. §§ 761-68, Federal Arbitration Act, 9 U.S.C. §§ 1-16, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, and Jones Act, 46 U.S.C. App. § 688.

[4] *E.g.*, Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1367; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 U.S.C. §§ 2001-73.

assisted with international maritime projects undertaken by the United Nations, the International Maritime Organization, and the Comité Maritime International.

In particular, the MLA has been keenly interested and involved in the area of recreational boating with its increasing popularity and inclusion within admiralty jurisdiction. The MLA includes a Committee on Recreational Boating, which considers issues arising from the increasing presence of pleasure craft on this country's waters as well as the impact of legislation and judicial decisions concerning recreational boating on other areas of maritime law. The MLA has a strong interest in this case because it concerns whether maritime products liability law recognizes a cause of action for a manufacturer's decision not to install a propeller guard on a recreational boat motor.

SUMMARY OF ARGUMENT

This case lies at the intersection of two important principles of uniformity. In enacting the Federal Boat Safety Act (the "FBSA"), Congress expressed a clear intent to establish uniform national safety standards governing recreational boats and associated equipment. Similarly, to ensure the uniformity of rules governing maritime navigation and conduct, this Court held that admiralty jurisdiction extends to recreational boating accidents in *Foremost Insurance Co. v. Richardson*. In doing so, this Court made the general maritime law applicable to such cases, including the doctrine of maritime products liability established in *East River S.S. Corp. v. Transamerica Delaval, Inc.* Federal maritime law, as embodied in the FBSA and general maritime law, does not recognize Petitioner's propeller guard claim in light of the affirmative decision of the Coast Guard not to require propeller guards on recreational boat motors.

ARGUMENT

I. PETITIONER HAS NO STATE COMMON-LAW CLAIM BECAUSE MARITIME PRODUCTS LIABILITY LAW GOVERNS THIS CASE.

A. Propeller Guard Claims, Such as Petitioner's, Fall Within the Ambit of Admiralty and Maritime Jurisdiction.

Throughout this litigation, Petitioner has ignored that his claim falls within the ambit of admiralty and maritime jurisdiction. Surprisingly, Petitioner's *amici* disagree as to whether his propeller guard claim is subject to admiralty jurisdiction. *Compare* Brief *Amici Curiae* of the States of Missouri, *et al.* ("States Br.") at 4, 12-13 *and* Amicus Curiae Brief of The Association of Trial Lawyers of America in Supp. of Pet'r ("ATLA Br.") at 22. The existence of admiralty jurisdiction should not, however, be lightly ignored because it bears significantly on the issues before this Court.

Maritime tort jurisdiction exists over claims that involve both a maritime "locus" and "nexus." *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The maritime locus requirement is satisfied generally where the alleged tort occurred on navigable waters. The maritime nexus requirement is satisfied where: (1) the type of incident at issue poses "a potentially disruptive impact on maritime commerce" and (2) the "general character" of the "activity giving rise to the incident" bears a "substantial relationship to traditional maritime activity." *Id.*; *Sisson v. Ruby*, 497 U.S. 358, 363-67 (1990).

Importantly, this Court has repeatedly recognized, in the interest of uniformity, that admiralty jurisdiction extends to accidents involving recreational boats. *See, e.g., Sisson*, 497 U.S. at 363-67 (applying maritime jurisdiction to a fire aboard a noncommercial vessel in a marina); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-77 (1982) (applying

admiralty jurisdiction to a collision between two noncommercial vessels). The application of admiralty jurisdiction to recreational boating accidents is thus now well established. Accordingly, in its most recent opinion concerning recreational boating, this Court summarily concluded that "[b]ecause this case involves a watercraft collision on navigable waters, it falls within admiralty's domain." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996). Like the present case, *Calhoun* also involved a products liability claim against a recreational boating manufacturer. *See id.* at 202.

Petitioner's claim similarly satisfies the Court's test for admiralty jurisdiction. First, the accident at issue occurred on the navigable waters of Dale Hollow Lake.[5] J.A. 101. In *Finneseth v. Carter*, a case involving a collision between two pleasure craft, the Sixth Circuit Court of Appeals expressly determined that "Dale Hollow Lake is an interstate water body susceptible or capable of being used as an interstate highway of commerce" and "it meets the Supreme Court's requirements for navigability for admiralty jurisdiction . . . ." 712 F.2d 1041, 1047 (6th Cir. 1983).

Second, the type of maritime incident at issue poses a potentially disruptive impact on maritime commerce. This inquiry requires a court to "assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson*, 497 U.S. at 363. Accidents involving collisions and allisions on

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[5] Dale Hollow Lake is an interstate lake covering 27,700 surface acres of water, 620-miles of shoreline, and portions of six counties in Tennessee and Kentucky. *See* <http://www.orn.usa.:e.army.mil/op/DAL/rec> (visited May 7, 2002). Fourteen commercial marinas on the lake provide a variety of services to millions of visitors every year, including small vessel and houseboat rental, restaurants, moorage, and lodging. *Id.*; *see also* <http://www.dalehollow-lake.net> (visited May 7, 2002). A map of Dale Hollow Lake is attached to this Brief as an Appendix.

navigable waters, such as here, especially when coupled with maritime law's traditional concern for navigation satisfy this test. *Foremost*, 457 U.S. at 675.

Third, the general conduct involved in this case bears a substantial relationship to traditional maritime activity. The proper inquiry is "whether the tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart*, 513 U.S. at 539-40. This case concerns the safety and operation of a recreational boat on navigable waters, which this Court has recognized "clearly falls within the substantial relationship." *Id.* at 540 (*citing Foremost*, 457 U.S. at 675). Therefore, Petitioner's claim falls squarely within admiralty jurisdiction.[6]

B. Maritime Products Liability Law Governs Defective Design Claims Involving Recreational Boats and Associated Equipment.

This jurisdictional analysis cannot be ignored because it provides the necessary first step in determining what law governs Petitioner's claim. As this Court has held, "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). Substantive admiralty law applies to suits subject to a court's admiralty jurisdiction whether the plaintiff files the suit in federal or, as in this case, state court. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). Under the "Savings to Suitors" Clause, state courts have jurisdiction to consider *in personam* maritime claims, but federal maritime standards govern a plaintiff's substantive legal rights. *Id.* at 222-23. That is, the

[6] *See Calhoun v. Yamaha Motor Corp., U.S.A.*, 216 F.3d 338, 345 (3d Cir.) (finding admiralty jurisdiction on remand), *cert. denied*, 531 U.S. 1037 (2000).

so-called "reverse-*Erie*" doctrine limits "the extent to which state law may be used to remedy maritime injuries." *Id.*; *accord* ATLA Br. at 27.

In recent cases, this Court has suggested, however, that the *East River* maxim is not iron clad, that is, "federal admiralty jurisdiction does not result in automatic displacement of state law." *Grubart*, 513 U.S. at 545; *see also Calhoun*, 516 U.S. at 206 (addressing remedies available to parents of recreational boater killed in state territorial waters); *American Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (considering federal displacement of state *forum-non-conveniens* law). Unlike the present case, these cases did not address whether federal or state *liability* standards governed a plaintiff's maritime claim. *See, e.g., Calhoun*, 516 U.S. at 215 n.13 (declining to decide law governing liability in maritime design defect case). If this Court's statement in *East River* is to have any meaning, however, federal maritime law must apply to Petitioner's products liability claim.[7]

Indeed, this Court's holding in *East River*—although ignored by Petitioner—itself demonstrates the applicability of substantive maritime law to his products liability claims. In *East River*, the Court recognized, for the first time, the doctrine of "products liability, including strict liability, as a part of the general maritime law." 477 U.S. at 865. *East River* thereby created a field of maritime products liability law as a part of the general maritime law. Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1373 (1999) ("Force, *Common Law*").

Importantly, the *East River* Court did not simply adopt state law or leave the resolution of products liability claims,

[7] As the authors of a leading treatise have observed, "[i]f there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-17 at 48 (2d ed. 1975) ("GILMORE & BLACK").

in maritime cases, to state law. The Court could, of course, have easily done so because, at the time of its decision, the overwhelming majority of states had adopted some form of products liability law. *See Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1134 & n.2 (9th Cir. 1977) (noting the prevalence of state strict products liability law). Moreover, this Court had previously chosen to apply state law, in maritime cases, in the absence of a congressionally or judicially established maritime rule. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21 (1955); *see also Miller*, 510 U.S. at 451-52.

Nevertheless, the Court decided, instead, to "fashion" a federal admiralty rule and, in doing so, created a body of maritime products liability law. The creation of federal maritime products liability law reflects the need for uniform standards for vessel and equipment design in light of their inherently mobile nature. This maritime products liability law, along with the FBSA, 46 U.S.C. §§ 4301-11, governs Petitioner's propeller guard claim—not Illinois law. *Cf.* ATLA Br. at 22, 27. As demonstrated below, federal maritime law does not recognize such a design defect claim.

C. Maritime Law Does Not Recognize a Design Defect Claim for a Manufacturer's Decision Not to Install a Propeller Guard.

In light of *East River*, this Court must look to federal maritime law, not Illinois law, to determine whether Petitioner may maintain a design defect claim for the lack of a propeller guard on a recreational boat motor. Two sources of law comprise federal maritime law: congressional legislation and general maritime law.[8] GILMORE & BLACK § 1-17 at 47; Force, *Common Law* at 1370. Where Congress

[8]The "general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules" taken from federal and state sources. *East River*, 476 U.S. at 864.

has enacted maritime legislation, it supplies the applicable substantive maritime rules. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). "Absent a relevant statute, the general maritime law, as developed by the judiciary, applies." *East River*, 476 U.S. at 864.

The relevant statute, here, is the FBSA and the related regulations issued by the United States Coast Guard (the "Coast Guard"). The FBSA and Coast Guard regulations do not directly answer the question before this Court. The FBSA is silent on propeller guards. The Coast Guard affirmatively decided not to promulgate a regulation requiring them.

This Court has recently held, nevertheless, that, in developing general maritime law, courts must accord great deference to related federal legislation and the limits imposed by Congress. *See Miles*, 498 U.S. at 27 ("we must also keep strictly within the limits imposed by Congress . . ., and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation."). Federal legislation, such as the FBSA, represents the courts' "primary guide" in defining the general maritime law in congressionally regulated areas "both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Higginbotham*, 436 U.S. at 624; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 176 (1978) (same). The FBSA, its legislative history, and the Coast Guard's regulatory activity do not support recognition of propeller guard claims under federal maritime law.

Congress enacted the FBSA in 1971 "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating . . . ." SEN. REP. NO. 92-248, 92d Cong., 1st Sess. 6 (1971) ("SEN. REP."). Congress intended the FBSA to be a "comprehensive

piece of legislation." H.R. REP. NO. 92-324, 92d Cong., 1st Sess. 10 (1971) ("H.R. REP."). Among its key provisions, the FBSA authorized the Coast Guard, to which rule-making authority was delegated, to establish "minimum safety standards for recreational vessels and associated equipment." 46 U.S.C. § 4302(a)(1).

In authorizing the Coast Guard to promulgate safety standards for associated equipment, such as recreational boat motors, Congress sought to foster the "establishment of *national* construction and performance standards." SEN. REP. at 15 (emphasis added). Congress recognized that the "need for *uniformity in standards* if interstate commerce is not to be unduly impeded supports the establishment of *uniform construction and equipment standards* at the Federal level." *Id.* at 14 (emphasis added). Congress intended the Coast Guard's safety standards to "preempt[] the field of boating standards or regulations." H.R. REP. at 11; *see also* 46 U.S.C. § 4306. Therefore, the Coast Guard's safety standards apply not only to all recreational boats and associated equipment on navigable waters but also to all boats or equipment introduced into interstate commerce.[9] 46 U.S.C. §§ 4301, 4307.

The FBSA empowers the Coast Guard, however, only to promulgate standards necessary "to avoid a substantial risk of

[9] The legislative history conclusively shows Congress's intent. *See, e.g.*, SEN. REP. at 17 ("Applicability of the sections dealing with safety standards is extended to 'boats' that move in interstate commerce. This is intended to assure that virtually all boats are manufactured in compliance with federal safety standards whether or not they will be operated within the federal maritime jurisdiction."); H.R. REP. at 13 (same); *Recreational Boat Safety: Hearings on H.R. 15041, H.R. 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 36 ("H.R. Hearing") ("This subsection utilizes interstate commerce as the constitutional basis to extend the applicability of those sections of the Act pertaining generally to boat safety standards to certain boats in addition to those used on waters subject generally to Federal jurisdiction.").

personal injury to the public" and "appropriate in relation to the degree of hazard that the compliance will correct." *Id.* § 4302(c)(3). The Coast Guard testified, at the FBSA hearings, that it would promulgate regulations only where necessary to insure the manufacture of reasonably safe and reliable boats and equipment. *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 45, 54, 55 ("Sen. Hearing"); H.R. Hearing at 79. In prescribing such regulations, the Coast Guard must (1) consider whether a regulation will contribute to recreational vessel safety, (2) evaluate relevant recreational vessel safety standards, statistics, and data, and (3) consult with the National Boating Safety Advisory Council ("NBSAC"). *Id.* § 4302(c).

In the context of this legislative and administrative scheme, the Coast Guard considered, in 1988, whether to promulgate a safety standard requiring propeller guards. The Coast Guard initially instructed the NBSAC to study the feasibility and potential safety advantages and disadvantages of propeller guards. The NBSAC appointed a Propeller Guard Subcommittee (the "Subcommittee") and directed it to assess "the arguments for and against some form of mechanical guard to protect against propeller strikes" and consider whether "the Coast Guard [should] move towards a federal requirement for some form of propeller guard."[10] J.A. 43.

Following a year-long study, the Subcommittee recommended that the Coast Guard "take no regulatory action to require propeller guards."[11] J.A. 40. The Subcommittee

[10] The Subcommittee included a Coast Guard representative as well as state, industry, and public members. J.A. 71.

[11] The Subcommittee conducted field tests of various types of propeller guards, heard testimony and received reports from designers, manufacturers, plaintiff attorneys, naval architects, a former Coast Guard engineer, propeller guard advocates, and physicians, and reviewed numerous documents, video tapes, and other visual materials. J.A. 13-17,

based this recommendation on several findings. First, the Subcommittee concluded that propeller guards significantly increased the underwater profile of recreational boats, thereby magnifying the possibility of blunt trauma injuries. J.A. 36. Some propeller guards were also found to pose a risk of catching body appendages in the guards and holding them against the propellers. *Id.* Second, the Subcommittee determined that, at normal operating speeds, propeller guards interfered with the boats' steering and control. J.A. 31-32, 37. Finally, the Subcommittee found that "[n]o simple universal design suitable for all boats and motors in existence ha[d] been described or demonstrated to be technologically or economically feasible." J.A. 38.

The Subcommittee presented its report to the NBSAC, which unanimously adopted its recommendations. J.A. 74-79. The NBSAC referred the report to the Coast Guard. The Coast Guard reviewed the Subcommittee's report and adopted all of its recommendations, including its recommendation to take no regulatory action to require propeller guards. J.A. 80. The Coast Guard noted, *inter alia*, that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.* The Coast Guard's affirmative decision not to require propeller guards evidences the agency's determination that such a requirement would not "contribute to recreational vessel safety." [12] 46 U.S.C. § 4302(c)(1).

49-56. Based upon this study, the Subcommittee drafted a report to the NBSAC, which the Subcommittee unanimously approved. J.A. 14.

[12] The Coast Guard has promulgated regulations under the FBSA where it has determined that the regulations would contribute to recreational vessel safety. The Coast Guard has issued regulations governing "design and construction of recreational boats," including "manufacturer certification, identification of boats, display of capacity information, safe loading, safe powering, flotation, electrical systems, fuel systems, ventilation, start-in-gear protection, navigation lights, and backfire flame control." <http://www.uscgboating.com/reg> (visited May 9, 2002); *see also* 33 C.F.R. Pts. 173-75, 177, 179, 181, 183 (2000).

In light of the FBSA's legislative history and the Coast Guard's affirmative decision not to impose a propeller guard requirement, this Court should not recognize Petitioner's propeller guard claim under federal maritime law. *See* James W. Bartlett, III, *Recreational Boats: The Evolution of Jurisdiction and Choice-of-Law Issues from the Constitution Through the Calhoun Decision*, 75 TUL. L. REV. 1247, 1293-94 (2001). Congress has established a comprehensive scheme for identifying and promulgating necessary safety standards, leaving the ultimate decision to the Coast Guard. This case is not one of "inaction" by the Coast Guard. Rather, the Coast Guard "studied . . . and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement." *Lady v. Neal Glaser Marine, Inc.*, 228 F.3d 598, 615 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). Thus, courts should defer to the statutory scheme devised by Congress in the FBSA in developing standards of conduct and safety under the general maritime law.[13]

It is inconceivable that Congress intended for courts or juries to establish their own safety standards under the guise of general maritime law as Petitioner's *amicus* ATLA suggests.[14] *See* ATLA Br. at 28. Permitting courts to do so

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[13] The lower federal courts often look to Coast Guard regulations, or the absence of a regulation, in determining liability in maritime cases. *See, e.g., Jackson v. OMI Corp.*, 245 F.3d 525, 528 (5th Cir. 2001) (finding vessel was not unseaworthy where the "design of the doorway in question was dictated by federal regulations"); *Jussila v. M/T Louisiana Brimstone*, 691 F.2d 217, 219 (5th Cir. 1982) (noting that no Coast Guard regulation required different color for metal rim on which plaintiff tripped).

[14] It would be naive to suggest that jury verdicts in products liability cases do not establish "standards" to which manufacturers are forced to adhere. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 882

would not only undermine Congress's clear intent but would also greatly harm the uniformity of maritime law, thereby producing significant practical problems for manufacturers and boat operators. *See infra* at III. The general maritime law should especially not be extended to include Petitioner's propeller guard claim when almost every court to have considered similar cases—both federal *and* state—has refused to recognize such claims although for different reasons.[15]

II. THE FBSA PREEMPTS PETITIONER'S PROPELLER GUARD CLAIM.

Even if this Court considers this case under the preemption analysis applied by the Supreme Court of Illinois, it should still affirm the court's holding. The MLA leaves to other parties consideration of the type of preemption that applies to this case but addresses two issues that bear directly upon this issue: the supposed presumption against preemption and the FBSA's "savings" clause. Indeed, this Court has recognized that "the categories of preemption are not 'rigidly distinct.'"

(2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 509 (1996) (O'Connor, J., concurring and dissenting); *see also* ROBERT FORCE, *U.S. Tort Law Problems, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 191, 212-14 (William A. Lovett ed., 1996).

[15] *See, e.g., Lady, supra*; *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1505-06 (11th Cir. 1997), *cert. dismissed*, 523 U.S. 113 (1998); *Carstensen v. Brunswick Corp.*, 49 F.3d 430, 431-32 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995); *Moss v. Outboard Marine Corp.*, 915 F. Supp. 183, 186 (E.D. Cal. 1996); *Davis v. Brunswick Corp.*, 854 F. Supp. 1574, 1580 (N.D. Ga. 1993); *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81, 83 (D. Conn. 1993); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery v. Mercury Marine, Div. of Brunswick Corp.*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Ryan v. Brunswick Corp.*, 557 N.W.2d 541, 548-49 (Mich. 1997); *Fitzpatrick v. Madonna*, 623 A.2d 322 (Pa. Super. Ct. 1993); *Veal v. Teleflex, Inc.*, 586 So.2d 188 (Ala. 1991); *but see Ard v. Jensen*, 996 S.W.2d 594, 599-600 (Mo. Ct. App. 1999); *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250-51 (Tex.), *cert. denied*, 513 U.S. 1057 (1994).

Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 n.6 (2000) (*quoting English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). Regardless, under whatever preemption analysis applies, Congress plainly intended the FBSA to invest the Coast Guard with the sole authority to promulgate safety standards and, therefore, to preempt any other entity—whether legislative, administrative, or judicial—from doing so. *See Medtronic*, 518 U.S. at 485-86 ("any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'") (citation omitted).

A. No Presumption Against Preemption Exists Because Petitioner's Claim Affects National Maritime Commerce.

Petitioner begins his preemption analysis by arguing that a strong "presumption against preemption" governs his case. Pet'r Br. at 16; *see also* States Br. at 5-7. Petitioner is incorrect. As this Court recognized recently in *United States v. Locke*, no presumption against preemption exists where the state laws in question "bear upon *national* and international *maritime commerce*." 529 U.S. 89, 108 (2000) (emphasis added). The regulation of maritime commerce is a matter in "which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Ray*, 435 U.S. at 157. Contrary to Petitioner's suggestion, the Court's reasoning in *Locke* applies equally to his case. *See* Pet'r Br. at 17-21.

First, the federal government has historically regulated non-commercial vessels as well as commercial vessels. Petitioner's *amicus* the Solicitor General concedes that "[f]or most of the last century, Congress sought to promote the safe use of motorboats through various statutory requirements." Brief for the United States as Amicus Curiae Supporting Petitioner ("U.S. Br.") at 1. As early as 1910, Congress enacted the Motor Boat Regulations Act, 46 U.S.C. § 511 *et*

seq. The act covered "'every vessel propelled by machinery and not more than sixty-five feet in length except tugboats and towboats propelled by steam.'" *Kelly v. Washington*, 302 U.S. 1, 5 (1937) (*quoting* § 1 of the act). Among its provisions, the 1910 act established safety equipment requirements for all motor boats covered by the act.[16] *Id.*

Congress expanded the scope of this act in enacting The Motorboat Act of 1940, 54 Stat. 165, 46 U.S.C. § 526a-t. The 1940 act imposed equipment and design requirements on motorboats and established penalties for the negligent or reckless operation of motorboats. H.R. REP. at 37-41 (reproducing the act). Thereafter, Congress enacted The Federal Boating Act of 1958, 72 Stat. 1754, 46 U.S.C. § 527a-h. The 1958 act created a numbering system for certain undocumented vessels, amended provisions of the 1940 act concerning the reckless or negligent operation of motorboats, and otherwise sought to "encourage uniformity of boating laws, rules, and regulations . . . ." H.R. REP. at 46 (reproducing the act).

Most recently, Congress legislated in the field of recreational boating by passing the FBSA. *See supra* at 9-11. Thus, Congress has actively regulated non-commercial vessels for nearly a century, expanding the scope of its regulation, as necessary, to address the expansion of recreational boating. This regulation represents just one component of Congress's historical regulation of maritime commerce, considered more broadly in *Ray* and *Locke*.

[16] Addressing the act's preemptive scope, the *Kelly* Court observed that "[i]f, however, the state goes further and attempts to impose particular standards as to structure, design, equipment, and operation, which in the judgment of its authorities may be desirable, but pass beyond what is plainly essential to safety and seaworthiness, the state will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." 302 U.S. at 15.

Second, the fact that the FBSA may not affect *international* commerce is irrelevant because it directly affects *national* maritime commerce. For example, the Coast Guard's regulations govern boats that may be leased, rented, or moored at commercial marinas. As expressly required by the admiralty jurisdiction test, recreational boating safety standards may have a direct effect on commercial shipping as recreational boating accidents can disrupt *all* maritime traffic on busy waterways, including commercial traffic. Moreover, Congress intended the Coast Guard's safety standards to apply to all recreational boats manufactured, sold, or delivered into interstate commerce. 46 U.S.C. § 4307; *see also supra* note 9. Therefore, the safety standards at issue derive from the federal government's historical regulation of maritime *and* interstate commerce.

Third, this Court's own precedents establish that the field of recreational boating products liability law is not subject to state police powers. In *Foremost*, this Court recognized that admiralty jurisdiction extends to recreational boating accidents. 457 U.S. at 674-77. Subsequently, in *East River*, this Court created the field of maritime products law, which applies equally to recreational and commercial vessels. 476 U.S. at 865. *Foremost* and *East River* removed the types of recreational boating claims at issue in this case from state police powers to the extent state police powers ever properly regulated them. If Petitioner is entitled to tort compensation, he must obtain it under federal law.

Lastly, this case does not involve a situation that calls for the balancing of federal and state interests or the accommodation of state law by federal maritime law. *See* Pet'r Br. at 20-21. This case involves, instead, important national interests. Congress recognized these interests in applying safety standards under the FBSA to all recreational boats manufactured or sold into interstate commerce. Where, as here, Congress acts in an area affecting maritime commerce, the national interest in applying federal maritime law

is particularly strong and should prevail. *See* Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1473-75, 1481-86 (2001) (Force, *Choice of Law*). Similarly, this Court recognized the importance of uniformity in the field of maritime products liability in *East River*.

B. The FBSA's Savings Clause Does Not Preserve Petitioner's Propeller Guard Claim

The FBSA provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioner contends that this "savings" clause expressly preserves his state common-law products liability claim. *See* Pet'r Br. at 28-32. This reading of § 4311(g) is overly broad and conflicts markedly with the FBSA and Congress' stated intent in enacting it.

In *Tallentire*, this Court identified the relevant considerations for evaluating the scope of a savings clause in maritime legislation, such as the FBSA. The Court considered whether the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68, preempted state-law remedies for wrongful death where the death occurred on the high seas. *Tallentire*, 477 U.S. at 209. Under DOHSA's savings clause, the "provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected . . . ." 46 U.S.C. § 767. The Court evaluated this savings clause "in light of the language of the Act as a whole, the legislative history of [the savings clause], the congressional purposes underlying the Act, and the importance of uniformity of admiralty law." *Tallentire*, 477 U.S. at 221.

Unlike here, the "congressional debates [concerning DOHSA]. . . were exceedingly confused and often ill informed." *Id.* at 225. Nevertheless, considering the clause's language and legislative history as well as Congress's intent

to establish a uniform remedy, the Court construed DOHSA's savings clause as a jurisdictional savings clause and not "an endorsement of the application of state wrongful death statutes to the high seas." *Id.* at 231-32. The Court characterized as "incongruous" "the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas." *Id.* at 230; *see also Locke*, 529 U.S. at 107.

Section 4311(g) of the FBSA likewise does not bear Petitioner's reading when viewed in light of the *Tallentire* considerations. The FBSA's "Federal preemption" provision states that:

> [A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. The FBSA vests the Coast Guard with sole authority for prescribing safety standards. *Id.* §§ 4302(a)(1), 4307(a)(1).

These provisions of the FBSA, when evaluated in light of the legislative history and congressional purposes underlying the FBSA, preclude reading the savings clause to preserve Petitioner's claim. The legislative history of the FBSA expresses Congress's intent to preempt the field of boat and equipment standards in clear and explicit terms:

> [Section 4306] provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime

> safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

SEN. REP. at 20; *see also* H.R. REP. at 11.[17]

Indeed, the Coast Guard itself testified in favor of federal preemption in the course of the Senate and House hearings. Admiral McClelland of the Coast Guard stated that:

> Presently, the Federal Government cannot preempt the boating standards field. It is even possible for States independently to establish safety standards and equipment requirements so varied as to make it difficult for the manufacturer to comply with all of them, and, of course, for the boatman to comply with the law when he moves between jurisdictions. [¶] This legislation will provide a solution to this problem by providing the Coast Guard with preemptive authority.

Sen. Hearing at 45. *See also id.* at 50, 53, 54; H.R. Hearing at 59, 61, 66.

In contrast, the savings clause, which was not a part of the original bill, received relatively little attention and was viewed primarily as a "technical" amendment by its proponents. Sen. Hearing at 88. Regardless, the savings clause was intended merely to insure that compliance with the Coast Guard's standards alone would not insulate a manufacturer from liability. The Coast Guard understood, for example, that the FBSA would not relieve a manufacturer "from liability under the usual tort law concerning negligence or warranties." *Id.* at 66. Construing § 4311(g) more broadly

[17] Testifying in favor of the act, for example, Representative Monagan warned of the urgency of this legislation to prevent the "proliferation of dissimilar [state safety] standards" and observed that "[f]ederal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now." H.R. Hearing at 48.

would greatly undermine the uniformity of maritime law and the congressional purposes underlying the FBSA.

Therefore, this Court should read the FBSA's savings clause as not preserving Petitioner's state common-law claim. Taken to its logical conclusion, Petitioner's position reduces to an argument *ad absurdum*. Petitioner contends that the FBSA provides no "basis for exempting any defendant from any common-law liability." Pet'r Br. at 29. If the FBSA imposes *no limits* on common-law actions, then a jury could hold a manufacturer liable for installing equipment, on a recreational boat, *expressly required by the Coast Guard*. Petitioner's position would consequently permit juries to disregard Coast Guard regulations with respect to safety standards. Congress could not have intended juries to establish independent safety standards, having generally denied state legislatures and administrative agencies that right. *Cf. Geier*, 529 U.S. at 869 ("Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations.").

Reading § 4306 to preempt Petitioner's propeller guard claim, on the other hand, does not produce similarly absurd results. Indeed, it is more reasonable to view the savings clause as simply ensuring that mere compliance with Coast Guard regulations does not relieve an operator or manufacturer from all liability. *See* Sen. Hearing at 66. Such an interpretation does the least violence to the statutory language and congressional purposes underlying the FBSA while not depriving a plaintiff of a remedy. For example, even if a plaintiff could not bring a propeller guard claim, he could still sue the operator for negligent operation of the boat. A plaintiff could also sue a manufacturer for improperly manufacturing or installing safety equipment. Thus, even if § 4306 preempted Petitioner's propeller guard claim, § 4311(g) would still save "some significant number of common-law liability cases" for victims of recreational boating accidents. *Geier*, 529 U.S. at 868.

The fact that, here, the Coast Guard affirmatively decided *not to promulgate* a regulation, as opposed to issuing one, does not preclude affirmance. In *Ray*, this Court reaffirmed that states may not regulate "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." 435 U.S. at 178 (quotation & citations omitted). The *Ray* Court considered, *inter alia*, whether Washington could ban oil tankers larger than 125,000 DWT from Puget Sound where the Coast Guard had not. *Id.* at 173-78.

The Court recognized that the Coast Guard was authorized to issue such a ban under the Ports and Waterways Safety Act. *Id.* at 174. The Coast Guard had not, however, promulgated any regulation setting a maximum size limit for vessels. Nevertheless, this Court concluded that the Coast Guard had sufficiently addressed the size limitation question by issuing a traffic-control system prohibiting the passage of more than one 70,000 DWT vessel through Rosario Strait at a time and reducing this size limitation during bad weather. *Id.* 174-78. The Coast Guard's affirmative decision not to promulgate a propeller guard requirement, having studied the issue for more than a year, must likewise constitute a sufficient exercise of authority to preclude juries from imposing such a duty on manufacturers.

Lastly, ATLA's contention that the FBSA does not preempt Petitioner's propeller guard claim because it arises under the general maritime law, and not state law, is no more persuasive. ATLA Br. at 28. ATLA fails to consider the FBSA and the Coast Guard's affirmative decision not to require propeller guards on all motors in analyzing the scope of maritime products liability law. As discussed previously, this legislative and administrative history plays an integral role in defining the general maritime law. *See supra* at I(C). Even if the general maritime law would have recognized Petitioner's propeller guard claim in the absence of federal

legislation, the FBSA and the Coast Guard's regulatory activity plainly displaced such a federal common-law claim. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-17 (1981).

III. THE FBSA AND GENERAL MARITIME LAW REQUIRE UNIFORM SAFETY STANDARDS FOR RECREATIONAL BOATS AND, THUS, BAR PETITIONER'S PROPELLER GUARD CLAIM.

Whether the Court treats this case as presenting a question of federal maritime law or statutory preemption, the Court should be guided by the interests of uniformity. This case lies at the intersection of two important policies of uniformity: Congress's interest in having the FBSA provide uniform safety standards for all recreational boats and federal maritime law's traditional interest in uniformity. Ultimately, both of these interests reflect a *national interest* in uniform safety standards that protect recreational boaters and provide predictability for manufacturers. In this context, the MLA espouses uniformity not for its own sake but because it serves these important national interests.

A. Congress Intended the FBSA to Provide Uniform Federal Safety Standards for Recreational Boats and Associated Equipment.

That Congress intended the FBSA to establish *uniform* national safety standards for recreational boats and associated equipment cannot be doubted. Congress viewed the FBSA as creating a "comprehensive piece of legislation" designed to avoid "piecemeal changes in the Federal statutes relating to boats and boating safety." H.R. REP. at 10. To effectuate its desire for uniform standards, Congress ensured that recreational boats would "be built in accordance with the standards prescribed by one Federal agency"—the Coast Guard. *Id.* at 2. The Coast Guard itself recognized that the FBSA's "Federal preemptive measures [were] necessary to assure uniformity of safety standards." Sen. Hearing at 53.

The FBSA was a response to a practical need for uniformity identified by Congress:

> Unless the Federal Government establishes a uniform minimum safe-boating program, the lack of uniformity between States will pose an increasing burden on the boating public. The mobility of trailered boats, and contiguity of some waters to several States now present serious problems to law-abiding recreational boaters.

H.R. REP. at 29; *see also* Sen. Hearing at 70 (same); H.R. Hearing at 98 (same). Congress understood that uniform standards were necessary because recreational boat manufacturers sold their products throughout the country and the inherently mobile nature of recreational boats meant that an owner might operate his boat in different states. *See* H.R. Hearing at 36 ("The extent of Federal involvement continues to be found in the need for uniformity of law and regulation for a transient boating public as well as in the existing Federal capability."). For these same reasons, Congress extended the FBSA's regulation of safety standards to all recreational boats manufactured or sold into interstate commerce. *See* 46 U.S.C. § 4307(a); SEN. REP. at 14.

Congress was not unmindful, however, that recreational boats operate most often in state waters. Congress expressly permitted states, with the Coast Guard's approval, to regulate "the carrying or use of marine safety articles to meet *uniquely hazardous conditions or circumstances within the State*." 46 U.S.C. § 4306 (emphasis added). This exemption from federal preemption was meant to disrupt national uniformity to the least extent possible. The FBSA reserved the right of disapproval to the Coast Guard "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." SEN. REP. at 20; *see also* H.R. REP. at 16 (same).[18] This case involves no such local interest as no

[18] Congress reaffirmed its commitment to federal preemption and the establishment of uniform national safety standards when it later recodified the FBSA. *See* H.R. REP. NO. 98-388, 98th Cong., 1st Sess. 160 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 972.

party has suggested that propeller guards are necessary to meet uniquely hazardous *local* conditions.

B. Congress's Policy of Uniformity Reflects the Historical Importance of Uniformity in the Field of Maritime Law.

The centrality of uniformity in the maritime law of this country originates in the Admiralty Clause of the Constitution. *See* U.S. CONST. art. III, § 2. The Framers' decision to place maritime matters under national control was not an "idle one." Lizabeth L. Burrell, *Application of State Law to Maritime Claims: Is There a Better Guide Than Southern Pacific Co. v. Jensen?*, 21 TUL. MAR. L.J. 53, 54 (1996). Rather, the Framers created admiralty jurisdiction, at least in part, to establish a uniform maritime law. Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. LAW & COMM. 517, 547 (2001) (Force, *Deconstructing Jensen*); David P. Currie, *Federalism and Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 163.

The principal of uniformity in maritime law has also been recognized by this Court. For example, in *Jackson v. The Steamship Magnolia*, 61 U.S. 296 (1857), the Court extended the reach of admiralty jurisdiction beyond the tidal waters to the inland waters of the country. In *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874), this Court found it "unquestionable" that "the Constitution must have referred to a system of [maritime] law coextensive with, and operating uniformly in, the whole country." Subsequently, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1916), the Court held that state legislation was invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general

maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." This Court has continued to recognize that, in certain cases, "vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." *Calhoun*, 516 U.S. at 210 (citing cases).

While the Court's holding in *Jensen* has been questioned, uniformity remains "particularly important in the maritime arena." Force, *Common Law* at 1380. Non-uniformity invites inconsistent results capable of subverting the "traditional commercial maritime interests' need for decisional stability." Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Law*, 28 U. BALT. L. REV. 423, 444 (1999) ("Vitt, *Stemming the Tide*"). "National rules in the form of the general maritime law may be necessary to subject an industry to a single standard when the imposition of multiple standards would make it commercially burdensome for maritime commerce to operate efficiently." Force, *National Interests* at 1482.

These principles are particularly germane to Petitioner's claim. As Congress recognized in enacting the FBSA, uniform national rules for recreational boat and equipment design and construction are essential. Manufacturers cannot be subjected to different safety standards in each of the fifty states. Petitioner's contention that juries throughout the country should be permitted to set their own safety standards for boat motors would result in "precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent." *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 286 (1977).

C. This Court's Holdings in *Foremost* and *East River* Underscore the Importance of Uniformity in the Present Case.

This Court's holdings in *Foremost* and *East River* also recognize the importance of uniformity to the present case. *Foremost* held that admiralty jurisdiction extends to recreational boating accidents and thereby applied substantive admiralty law to recreational boating cases. The Court premised its holding, in part, on "the need for uniform rules to govern conduct and liability." *Foremost*, 457 U.S. at 674; *see also id.* at 677. In *East River*, the Court created a body of maritime products liability law applicable to *all* vessels within admiralty jurisdiction—non-commercial as well as commercial vessels. *See supra* at 7-8.

The Court's holding in *Calhoun* is not to the contrary. First, unlike *Calhoun*, this case implicates an act of Congress—the FBSA. *Calhoun*, which addressed the damages available for the death of a nonseafarer in state territorial waters, fell outside of the Jones Act and DOHSA. 516 U.S. at 215. Where Congress enacts comprehensive legislation, such as the FBSA, this Court has held that courts must defer to "the limits imposed by Congress." *Miles*, 498 U.S. at 27; *accord Higginbotham*, 436 U.S. at 623-24.

Second, *Calhoun* involved a question of remedies, not safety standards or liability. Congress intended the FBSA and the Coast Guard's regulations to establish uniform national safety standards. Petitioner seeks, however, to permit juries in every state to create their own standards, that is, to impose diverse duties upon the manufacturers of recreational boat motors. It is simply inconceivable that Congress, having sought to ensure uniformity in safety standards, could have intended to allow state juries to disregard the considered judgment of the Coast Guard in establishing their own divergent standards. *Cf. Tallentire*, 477 U.S. at 230-31.

D. Petitioner's Claim Undermines the National Interest in Uniform Federal Safety Standards as Prescribed by the FBSA and General Maritime Law.

The MLA does not propose that this Court endorse a uniform rule simply for the sake of uniformity. Rather, uniformity is critical here because this case involves important national interests and practical concerns. The approach Petitioner espouses would result in jury chaos, undermining the congressional purposes underlying the FBSA and the general maritime law.

The importance of uniformity is greatest where, as in this case, the development and/or enforcement of a uniform rule would promote a national interest underlying the Admiralty Clause. *See* Force, *Deconstructing Jensen* at 546-47. Here, Congress has supplied the national interest in uniformity in enacting the FBSA. *See id.* at 547-48 ("When Congress legislates in the maritime area, the national interest is determined by the objectives of the legislation."). In the FBSA, Congress created a mechanism for the establishment of uniform national safety standards for recreational boats and associated equipment to be promulgated by the Coast Guard. Relying upon its Commerce Clause powers, Congress also extended this regulatory authority to all recreational boats and associated equipment in interstate commerce.[19]

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[19] Petitioner's *amici* the States are, therefore, wrong when they suggest that maritime commentators would view propeller guard claims as necessarily subject to state common law. States Br. at 15. For example, Professor Young does not question the ability of Congress to enact "maritime legislation" and preempt state law under its Commerce Clause powers as it did with the FBSA. *See* Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad v. Tompkins and the Unconstitionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1364 (1999). Professor Young recognizes, moreover, that uniformity, where necessary in maritime law, may be achieved, as in other areas of law, through "first, Congress's power to impose uniformity by statute, and, second, the Constitution's prohibition on measures that discriminate against or unduly burden commerce between the states or with other nations." Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 349 (1999).

The practical need for uniformity underscores the importance of these national interests and evidences why Congress enacted the FBSA. Initially, recreational boat and equipment manufacturers require national construction and design standards because they design and manufacture boats, motors, and other products for sale throughout the country. Manufacturers need uniformity so that they can design their products to meet the applicable standards and not be subject to conflicting standards throughout the country.[20] H.R. Hearing at 373. Indeed, during the FBSA hearings, the Coast Guard testified that state enactment of diverse safety standards was "both a real and potential" problem. *Id.* at 67.

In addition, as the facts of this case reveal, the inherently mobile nature of boats necessitates uniformity. Here, the boat owner was a resident of Illinois, who appears to have purchased the boat and motor at issue in Illinois. J.A. 106. The accident occurred, however, while the boat was being operated on the Dale Hollow Lake in Tennessee. J.A. 107.

Even if the manufacturer knew that a motor would be sold in Illinois, it could not guarantee that it would be used there. Consequently, if juries in Illinois and Tennessee were left to establish their own common-law standards for propeller guards, a manufacturer, might be held to different standards depending upon the state in which it was sued, for example, if Illinois juries found that the failure to install a propeller guard rendered the motor defective but Tennessee juries found that the installation of a propeller guard rendered the motor

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[20] "The reason for such a preemption is to insure that manufacturers building for the entire domestic trade will not find themselves in the unfortunate position of having to comply with varying boat safety standards in different places." H.R. Hearing at 37.

defective. Under Petitioner's argument, two juries in the same state could even reach conflicting views.

Under the FBSA, state legislatures would be powerless to correct inconsistent or erroneous jury verdicts. *See* U.S. Br. at 11. Such non-uniformity prevents a manufacturer from knowing what standards apply to its product, a situation the FBSA was clearly designed to avoid. Congress could not have intended to permit juries to disregard the considered and expert determination of the Coast Guard that propeller guards did not "contribute to recreational vessel safety" especially where it preempted the states and their administrative agencies from doing so. 46 U.S.C. § 4302(c)(1).

This case demonstrates yet another practical problem, requiring uniformity. The lake on which the accident occurred, Dale Hollow Lake, is an interstate lake located in both Tennessee and Kentucky. Recreational boating takes place, in fact, on numerous interstate waters throughout the country, including the Potomac River (District of Columbia, Virginia, and Maryland), Long Island Sound (New York, Connecticut, and Rhode Island), Lake Tahoe (California and Nevada), and Lake Powell (Utah and Arizona). Recreational boaters also use rivers that run through a number of states, such as the Mississippi, Snake, and Colorado.

Therefore, a recreational boater can be in one state at one moment and another state the next. Without uniform standards, a manufacturer's liability would rest solely on the fortuity of where in the course of an afternoon's outing an accident occurred. As this Court reasoned in *Tallentire*, it strains reason to suggest that Congress intended to permit such divergent results in seeking uniform safety standards through the FBSA. *See* 477 U.S. at 230.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of Illinois and preserve the uniformity of maritime law.

Respectfully submitted,

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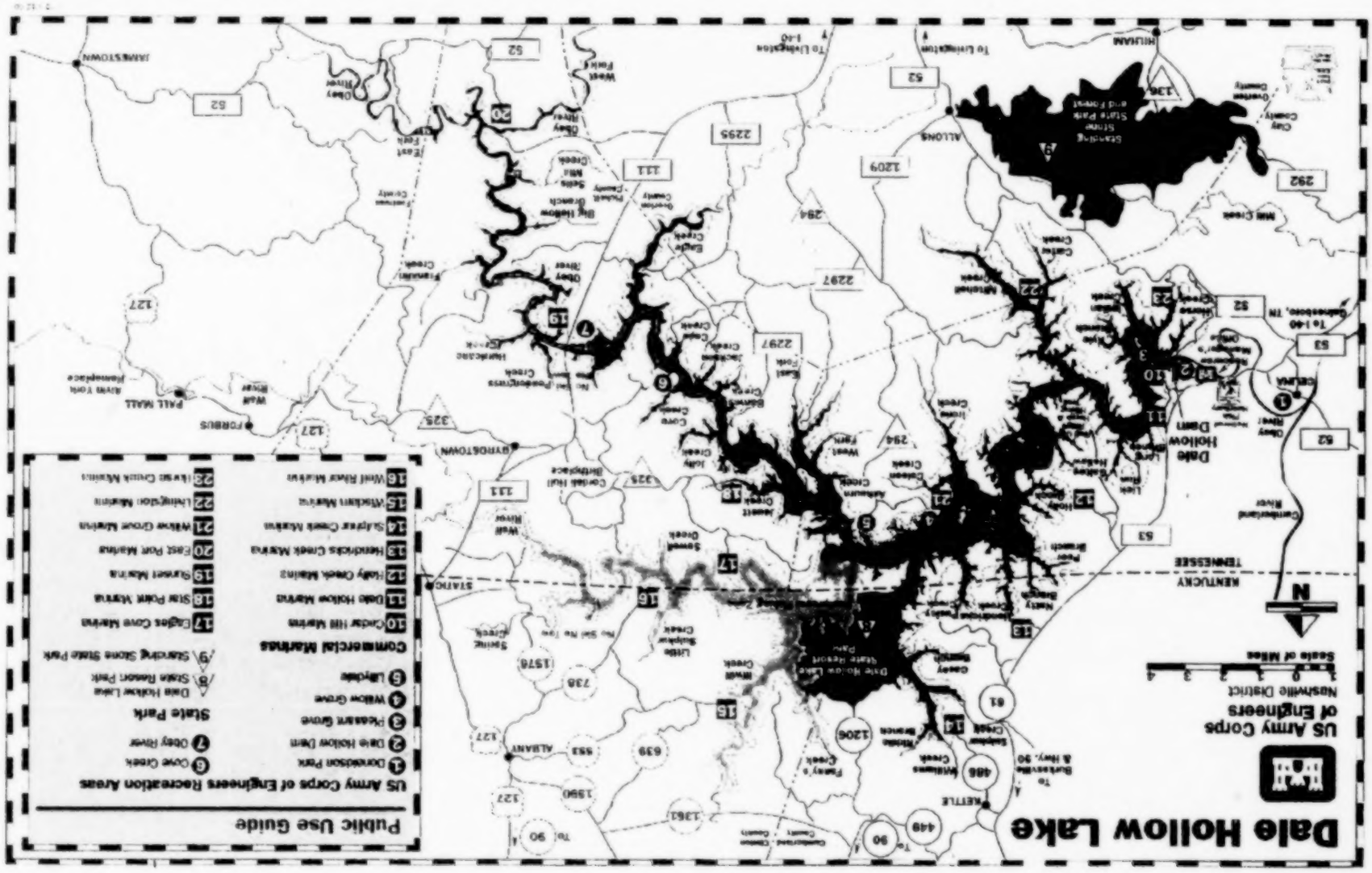

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No. 01-706

IN THE
Supreme Court of the United States

REX R. SPRIETSMA, ADMINISTRATOR
OF THE ESTATE OF JEANNE SPRIETSMA,
Petitioner,

v.

MERCURY MARINE, A DIVISION
OF BRUNSWICK CORPORATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 01-706

REX R. SPRIETSMA, ADMINISTRATOR
OF THE ESTATE OF JEANNE SPRIETSMA,
Petitioner,

v.

MERCURY MARINE, A DIVISION
OF BRUNSWICK CORPORATION,
Respondent.

**On Writ of Certiorari to the
Supreme Court of Illinois**

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1]

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the

It represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members, in every industrial sector and geographic region of the country. The Chamber has participated as amicus curiae in several hundred cases before this Court, including numerous cases addressing the subject of federal preemption. *See, e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995).

SUMMARY OF ARGUMENT

Petitioner's tort claim is preempted. To begin with, his claim arises in the uniquely federal field of maritime law. When Congress legislates in the maritime field, it customarily imposes uniform rules of conduct, safety standards, and design requirements on boats and maritime activities subject to federal jurisdiction. The Federal Boat Safety Act is no exception; Congress confirmed throughout the Act its intent that recreational boats be subject to uniform design and safety standards. Tort claims like petitioner's, however, would result in state-court juries articulating a welter of different safety and design standards, undermining both Congress's general intent consistently to regulate maritime activities and its specific intent in the Boat Safety Act to regulate recreational boat safety and design under uniform federal standards.

In the Boat Safety Act itself, moreover, Congress expressly balanced the goal of the statute—increasing boat safety through uniform standards—against the countervailing need for restraint before imposing onerous design changes on boat and equipment manufacturers. The Act specifically prohibits the Coast Guard from requiring manufacturers to substantially alter their existing stock and prohibits the agency from

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consent of the parties, and copies of the consent letters have been filed with the Clerk.

requiring even *insubstantial* alterations unless the benefits from those alterations far outweigh their attendant costs. State tort actions against manufacturers have no such limitations. Once a jury sets a safety standard, manufacturers must design to that standard or face the consequences. Similarly, with respect to prospective alterations, the Boat Safety Act grants manufacturers a generous grace period to bring their production in line with new federal requirements. State tort judgments make no such dispensation. Petitioner's tort suit thus conflicts not only with the purpose and intent of the Boat Safety Act, but with the Act's express terms.

Petitioner's tort claim, which depends on the allegation that propeller guards are required on outboard motors like Mercury Marine's, also conflicts with the Coast Guard's considered decision *not* to require propeller guards. The Coast Guard reached its conclusion after consulting with its expert advisory committee—as the Boat Safety Act requires—and after considering the Committee's submission regarding the prohibitive costs and dubious benefits of propeller guards. The Coast Guard's decision should be accorded preemptive effect. The agency was not required to give notice and seek comment before conflicting state law would be preempted; its considered decision, made after a year's worth of public inquiry and on the unanimous recommendation of its expert advisory panel, is quite sufficient—particularly in this federal field—to preempt conflicting state requirements.

Finally, petitioner's concerns about federalism and state sovereignty are overwrought. When Congress legislates in the maritime field, the federal interest in preserving uniformity controls, and neither States nor their juries have a role in developing or implementing their own several standards of maritime law.

ARGUMENT

PETITIONER'S ACTION IS PREEMPTED BY FEDERAL MARITIME LAW AND THE BOAT SAFETY ACT.

We agree with the Illinois Supreme Court that this is an admiralty case, Pet. App. 6, and we likewise agree with petitioner's amicus ATLA that federal maritime law controls the outcome of this case. *See* ATLA Br. 21. The question whether state law is preempted therefore need not be decided; rather, this Court can simply hold that federal maritime law provides the applicable rule of decision and does not impose a duty to install propeller guards. The expert agency charged with reviewing the utility of propeller guards has concluded that they may pose more safety problems than they solve, and it would undermine the national uniformity so prized in maritime law to allow state-court juries to second-guess that studied determination.

If this Court does reach the preemption issue, it should hold that the Federal Boat Safety Act preempts petitioner's state tort action. As Mercury Marine has explained in its brief, that decision can properly be grounded in any of the preemption doctrines that have grown up around the Supremacy Clause: express, field, or implied preemption. Further, as this Court has observed, the three categories of preemption are not "rigidly distinct." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). Above all, the "ultimate touchstone" of preemption analysis, *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 103 (1963), is congressional intent. *See Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985). To discern that intent, this Court examines both the express language and the "structure and purpose" of the statute at issue. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990); *FMC Corp.* v. *Holliday*, 498 U.S. 52, 56-57 (1990).

This unified theory of preemption is particularly appropriate when examining whether state tort law is preempted under the Federal Boat Safety Act. The matter at stake implicates maritime law, a field of uniquely federal interest from the time of the Founding. Congress similarly confirmed that federal interest in the Boat Safety Act itself, demonstrating a strong interest in maintaining uniform design standards for boats that may be used in navigable waters. Congress made its intent to preserve uniform design standards clear through its express preemptive language, through its delegation of rulemaking authority to experts in the field, and in the exacting provisions of the Act that reflect a careful balancing at the national level of the need for safe boats against the costs of making them safe.

A. The Boat Safety Act Was Intended To Promote Uniform Regulation In This Traditionally Federal Maritime Field.

This Court has recognized that there are some areas of regulation that implicate a "unique[ly] federal concern." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 508 (1988). Maritime law is one such area. *United States* v. *Locke*, 529 U.S. 89, 99 (2000). The reason: the acknowledged need for uniformity of regulation of maritime vessels operating in the United States' navigable waters. *See id.* at 109. The need for uniform regulation applies regardless of whether the maritime activity being regulated is commercial, *see Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), or primarily recreational, *see Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674-675 (1982) ("The federal interest in protecting maritime commerce * * * can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct") (emphasis in original). *See also Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990) ("[T]he need for uniform rules of maritime conduct and liability is not limited to navigation, but expands at least to any other activities traditionally undertaken by vessels"); *Calhoun* v. *Yamaha Motor Corp.*,

USA, 216 F.3d 338, 350 (3d Cir.) ("Creating a uniform system by which activities and events on the waters of the United States would be adjudicated was such a matter of concern to the Framers that they placed admiralty as among the powers of the newly-created federal government") (citing U.S. Const. art. 1, § 8, cl. 10), *cert. denied*, 531 U.S. 1037 (2000).

The federal government's "uniqu[e] * * * concern" in the maritime area manifests itself in two related ways. First, no presumption of state primacy arises in a preemption case presenting maritime issues. *See Locke*, 529 U.S. at 108. Second, where uniquely federal concerns are implicated, a lower threshold for conflict preemption applies, such that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.' " *Boyle*, 487 U.S. at 507 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As this Court put it in *Boyle*, "the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." 487 U.S. at 507-508. *See also* U.S. Br., *Buckman Co.* v. *Plaintiff's Legal Committee*, No. 98-1768, at 10 ("when state law intrudes on an area of preeminent federal concern, the presumption against preemption disappears, and the danger of a fatal conflict significantly increases").

The federal government's "long history of preemption in maritime safety matters" is reflected in Congress's expressed intent in the Boat Safety Act to create uniform standards of boat and equipment design. S. Rep. No. 92-248, at 20 (1971). In describing the purpose of the Act, the House Report accompanying the bill stated that it was "time that recreational boats be built in accordance with standards prescribed by one Federal agency," and that the bill was intended to "preemp[t] the field on boating standards or regulations." H.R. Rep. No. 92-324, at 2, 11 (1971). The

Senate Report similarly noted that "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S. Rep. No. 92-248, at 14; *see also id.* at 15 (Act intended to "authoriz[e] the establishment of national construction and performance standards for boats and associated equipment" and "encourag[e] uniformity among boating laws"); *id.* at 17 (Act "intended to ensure that virtually all boats are manufactured in compliance with federal safety standards whether or not they will be operated within the federal maritime jurisdiction"). Just as "Congress intended uniform national standards for design and construction of tankers" in the Ports and Waterways Safety Act, *Ray*, 435 U.S. at 163, it intended through the Boat Safety Act to impose similarly uniform requirements for recreational boat design.

Petitioner's state tort action rests on the allegation that Mercury Marine should have included a piece of equipment on its outboard motor that the federal government expressly declined to require. State tort suits like this one by their nature perpetuate *nonuniform* standards. Juries in different States presented with the same liability issue (*e.g.*, whether and what kind of propeller guards should have been installed) will deliver verdicts that articulate widely different safety and design standards—and all those different standards will apply to national boat manufacturers who sell products in, or whose products are operated in, those different States. *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 871 (2000) ("the rules of law that judges and juries create or apply in [tort] suits may themselves * * * create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts"). The cacophony of equipment and design "standards" created in such tort suits thus conflicts with the uniquely federal interest in uniformity of regulation as a general principle of maritime jurisprudence, and stands as an obstacle to Congress's effort to achieve

uniformity of boat equipment regulation in the Boat Safety Act.

Petitioner argues that Congress's goal was not to foster uniformity of regulation in this federal field, but simply to "improve boat safety," and that allowing tort actions like this one furthers that goal. *See* Pet. Br. 33, 38-39; *see also* ATLA Br. 15-17. That is wrong on two counts. First, the purpose of the Boat Safety Act was not just to "improve boat[] safety"; it was to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public *through compliance with safety standards to be promulgated by the [Coast Guard]*." S. Rep. No. 92-248, at 6 (emphasis added). Second, tort actions claiming a failure to install propeller guards do nothing to promote boat safety. The Propeller Guard Subcommittee concluded—after a year of study and in a recommendation adopted by the Coast Guard—that the risks caused by propeller guards at least counterbalanced their questionable safety benefit. *See* J.A. 39 ("The development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence"). Petitioner's and amicus ATLA's arguments that a de facto propeller guard requirement imposed by a jury *promotes* boat safety ignore the Subcommittee's unrebutted expert conclusion that propeller guards pose at least as many dangers as they might ward off.

B. State Tort Actions Against Boat Manufacturers Conflict With The Express Provisions Of The Boat Safety Act.

Allowing state juries to impose tort liability on manufacturers for purported design flaws conflicts not only with the federal interest in uniform maritime regulation and the congressional purposes behind the Boat Safety Act, but also with the Act's express terms. The Act prohibits the Coast Guard from "compel[ling] substantial alteration of a recreational

vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation." 46 U.S.C. § 4302(c)(3). Indeed, the Coast Guard may not require *any* alterations to existing equipment unless those alterations are necessary to "avoid a substantial risk of personal injury to the public" and "appropriate in relation to the degree of hazard that the compliance will correct." *Id.* Even with prospective changes in safety or equipment standards, the Act requires the Coast Guard to allow a six-month grace period before new regulations become effective, "unless * * * there exists a recreational vessel safety hazard so critical as to require an earlier effective date." *Id.* § 4302(b). The Coast Guard may extend the minimum six-month grace period to two full years, if the regulation "involve[s] major product design, retooling, or major changes in a manufacturing process." *Id.*

Section 4302 of the Boat Safety Act demonstrates that Congress balanced its strong interest in national boat equipment design and safety standards against the recognized need gradually to assimilate standard changes into commerce. *See* S. Rep. No. 92-248, at 18 (noting concern that "the specification of an earlier effective [compliance] date may result in serious dislocation of manufacturing procedures and schedules and [a]n increased cost to the consumer"); *id.* at 19 ("*great caution* [must] be exercised in applying standards to existing boats because of the great burden this can create on both manufacturers and the boating public"). In setting a high threshold for requiring changes to existing stock, Congress ensured that the Coast Guard's regulatory actions would be prospective only, *except* where it could be shown that the immediate safety benefits from requiring insubstantial alterations to existing boats or equipment far outweighed the burdens imposed on manufacturers of retrofitting those products. And Congress ensured that the effect on commerce of even *prospective* design and equipment requirements would be mitigated by granting manufacturers a liberal statu-

tory grace period to bring their products into compliance with the new standards.

Section 4302's firm restrictions on requiring alterations and its generous grace periods establish that Congress was not willing to achieve boat safety at all costs; rather, Congress understood that issues of manufacturing feasibility, financial considerations, and the need to implement change gradually in a national market all necessarily tempered the Act's goals. As this Court has recognized, such restrictive statutory terms may not be disregarded in favor of carrying out the Act's broader purpose; to do so would be to

> ignore[] the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. [*Board of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).]

See also Rodriguez v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law.") (Emphasis in original).

Allowing state-court juries to impose tort liability on manufacturers for failing to install propeller guards would frustrate the careful balance Congress struck in Section 4302 of the Boat Safety Act. A finding of tort liability—and a damage award—amounts to a finding that a manufacturer *should have* installed a guard on a piece of equipment currently in use. *See Geier,* 529 U.S. at 881. Once a jury hands down a liability verdict, manufacturers must either take steps to alter their stock currently in use—by, for instance, conducting a recall or retrofit campaign, *see Powers* v. *Bayliner*

Marine Corp., 83 F.3d 789, 792 (6th Cir.) (explaining the difference between the two actions), *cert. denied*, 519 U.S. 992 (1996)—or risk another adverse judgment in the same or another State for failing to retrofit that equipment. *See Geier*, 529 U.S. at 881 (rule of state tort law establishing duty to install airbags "would have required all manufacturers to have installed airbags" in all cars sold in that State); *id.* at 882 ("this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question") (emphasis in original). The action-forcing nature of a state tort verdict simply does not comport with Congress's express intent that retrofitting boats be required only under carefully limited circumstances.

C. The Coast Guard's Unambiguous And Informed Determination Not To Require Propeller Guards Is Entitled To Preemptive Effect.

1. The intent of Congress to preempt state tort actions imposing new boat design standards can also be seen in its exacting delegation of authority to the Coast Guard and an advisory panel of maritime and boat design experts. *See* S. Rep. 92-248, at 17 (administrative rather than statutory safety standards "take advantage of the expertise and flexibility available in the administrative process"). An expert subcommittee of the National Boat Safety Advisory Board issued a detailed and unanimous recommendation to the Coast Guard that it take no regulatory action to require propeller guards, and the Coast Guard implemented that recommendation. Its informed decision pursuant to congressional mandate should be accorded heavy weight.

Although it involved a different preemptive statute and did not touch on the federal field of maritime law, the Court's recent decision in *Geier* is instructive on this question. This Court held in *Geier* that a state tort action against an automobile manufacturer for failing to install an airbag was impliedly preempted by a safety standard promulgated under the

National Traffic and Motor Vehicle Safety Act of 1996. The 1984 standard at issue in that case, Federal Motor Vehicle Safety Standard (FMVSS) 208, directed automobile manufacturers gradually to phase in passive restraint devices in their vehicles. 49 Fed. Reg. 28962 (July 17, 1984). When the Department of Transportation promulgated FMVSS 208, it noted that "passive restraint systems had their own disadvantages" and that airbags in particular posed "special risks to safety," including the risk of injury to children occupying the front seat of a small car. 529 U.S. at 877 (citing 49 Fed. Reg. 28962, 28992-93 and 65 Fed. Reg. 30680, 30681-82 (May 12, 2000)). The Department also recognized that airbags were " 'significantly more expensive than other passive restraint devices' " such as seatbelts; a mandatory airbag requirement could potentially have cost manufacturers and consumers upwards of a billion dollars. 529 U.S. at 878 (citing 49 Fed. Reg. 28990 (1984)). The Department accordingly established a standard pursuant to which manufacturers could choose among various forms of passive restraint devices (*e.g.*, automatic seatbelts), and could bring their fleets into compliance with the flexible standard gradually over a period of time. 529 U.S. at 881.[2]

This Court concluded that FMVSS 208 preempted a state tort action that "depend[ed] upon [a] claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord." *Id.* That "state law—*i.e.*, a rule of state tort law imposing such a duty—by its terms would have required manufacturers of *all* similar cars to install airbags rather than other passive restraint systems" in their vehicles,

[2] In *Geier*, the Department of Transportation had approved airbags as one form of passive restraint device, to be introduced gradually over time. In this case, in contrast, the Coast Guard adopted the recommendation of its expert advisory committee and concluded that, because propeller guards did not satisfy the Boat Safety Act's stringent statutory standards, it would *not* require manufacturers to install such devices, on any boat, at any pace.

in tension with the Department's goal of achieving a mix of devices, and would have required the *entire* portion of the fleet sold in the State to carry airbags, in conflict with the Department's intent gradually to phase in passive restraint requirements in vehicle fleets. *Id.* (emphasis added). While the conflict with the agency's objectives posed by the state tort action did not arise from "a formal agency statement of preemptive intent," this Court found that to be of little moment in the conflict preemption inquiry: "conflict preemption * * * turns on the identification of 'actual conflict,' and not on an express statement of preemptive intent." *Id.* at 884 (quoting *English*, 496 U.S. at 90). "[This] Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." 529 U.S. at 884.

In this case, after receiving petitions to adopt a propeller guard requirement, *see* J.A. 18, the United States Coast Guard, acting pursuant to its statutory mandate under the Boat Safety Act, issued a formal and detailed request that the National Boating Safety Advisory Council investigate the feasibility of mechanical guards to protect against propeller strikes. *See id.* at 42-44. The Advisory Council—composed of twenty-one members appointed by the Secretary of Transportation and with particular "expertise, knowledge, and experience in recreational boating safety," 46 U.S.C. § 13110—appointed a Subcommittee to review and analyze "the available data on the prevention of propeller-strike accidents," examine the "various methods of shrouding propellers to prevent contact with [a] person in the water," and "[a]ssess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public." J.A. 43.

The Subcommittee conducted a year-long study of propeller guards, their potential benefits, and their attendant haz-

ards. It held public hearings, took documentary and testimonial evidence, and its members test-drove recreational boats with various forms of propeller guards attached. The Subcommittee concluded that propeller guards "can * * * be counter-productive and can create new hazards of equal or greater consequence," including *increasing* the risk of striking a body in the water, *id.* at 39, and *increasing* the likelihood of grave injury to a person struck by the blunt impact of the propeller guard or caught between the guard and the propeller. *Id.* at 34, 36. The Subcommittee also found that it had been "clearly demonstrated" that certain propeller guards caused "serious safety and control problems," posing real dangers for all but the most expert boat operators. *Id.* at 31; *see id.* at 31-35 (enumerating potential safety hazards of propeller guards). And the Subcommittee noted that retrofitting all existing boats with propeller guards would require a "vast number of guard models at prohibitive cost" *Id.* at 38. The Subcommittee unanimously recommended to the Coast Guard that it "take no regulatory action to require propeller guards." *Id.* at 76.

The Coast Guard accepted the Subcommittee's recommendation and confirmed that it would "take no regulatory action to require propeller guards." *Id.* at 80. In his letter adopting the Subcommittee's recommendations, the Chief of the Coast Guard's Office of Navigation Safety and Waterway Services referred to the Boat Safety Act's statutory standards for requiring design changes to existing boats, noting that the statute's "regulatory process is very structured and stringent regarding justification," and that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.* The letter also noted the "many questions about whether a universally acceptable propeller guard is available or technically feasible." *Id.* Finally, echoing the statute's recognition of the burdens on commerce and consumers of requiring massive retrofits, the Coast Guard letter noted that "the question of retrofitting

millions of boats would certainly be a major economic consideration." *Id.*[3]

Just as in *Geier*, a state tort action resting on a claim that a manufacturer had a *duty* to install propeller guards conflicts with the Coast Guard's considered decision to "take no regulatory action to require propeller guards." Petitioner's tort action is expressly predicated on the notion that propeller guards should have been installed on Mercury Marine's outboard motor—and by extension, all comparable Mercury Marine outboard motors, and even further, all other manufacturers' comparable outboard motors. *See Geier*, 529 U.S. at 881 (a finding of a state tort duty "by its terms would have required manufacturers of all similar cars to install airbags"). That requirement conflicts with the Coast Guard's opposite conclusion: that it would not require manufacturers to install propeller guards at all. *See NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (" 'For a state to impinge on the area of labor combat *designed to be free* is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' ") (quoting *Garner* v. *Teamsters Chauffeurs & Helpers Local No. 776*, 346 U.S. 485, 500 (1953)) (emphasis added).

The fact that the Coast Guard did not expressly state its intent to preempt state tort actions based on an alleged negligent failure to provide propeller guards is not determinative,

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[3] The Solicitor General characterizes the Coast Guard letter as merely suggesting that "at that time, the affirmative imposition of a federal propeller guard requirement *could not be justified* under the relevant statutory criteria." U.S. Br. 27 (emphasis added). Another way of saying this might be that a standard *requiring* propeller guards—achieved through a tort action, for example—would conflict with the Act's statutory criteria for such design standards. *See supra* at 8-10. The "relevant statutory criteria" under federal law for the imposition of safety standards are surely not irrelevant to the preemption analysis.

as this Court recognized in *Geier*: "actual conflict," not the agency's express intent to preempt, is what counts. 529 U.S. at 884. *See* U.S. Br., *Geier* v. *American Honda Motor Co.*, No. 98-1811, at 27 n.24 ("Conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. Here, because conflict preemption is at issue, *neither* a statement of preemptive intent *nor* notice and comment on preemption was required.") (emphases added and citation omitted).[4]

2. Petitioner and the Solicitor General argue that the agency's "considered decision to forego federal regulation," U.S. Br. 18, so akin to the careful balancing act performed by the agency in *Geier*, nonetheless is not entitled to preemptive effect. The Solicitor General distinguishes *Geier* on grounds that that case involved "an existing federal safety standard," while this case involves what the Solicitor General dubs a "failure to regulate." *Id.* at 19. But an agency's considered,

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[4] Although it did not expressly articulate preemptive intent at the time it adopted the Subcommittee's recommendation, the Coast Guard later acknowledged the preemptive effect of its decision not to regulate. In a notice inviting comment on requiring rental houseboats to carry propeller guards, the Coast Guard noted that "States do not have the authority to establish carriage requirements for associated equipment, such as a mechanical means for preventing propeller strikes, on vessels operated on waters where both the Coast Guard and the State have jurisdiction." 61 Fed. Reg. 13123, 13125 (Mar. 26, 1996).

Because the Coast Guard has previously stated that its decision not to regulate propeller guards preempts States from regulating that area of design, the Solicitor General's arguments against preemption should be accorded far less weight. *Compare Geier*, 529 U.S. at 883 (Court would place "some weight upon DOT's interpretation of FMVSS 208's objectives and its conclusion" that state tort suits would conflict with those objectives, particularly where agency had maintained its interpretation "consistently over time").

intentional decision *not* to regulate can have preemptive effect, as this Court repeatedly has recognized.

In *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court observed that a "federal decision to forego regulation in a given area may imply an authoritative determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Id.* at 384 (emphases in original) (citing *NLRB* v. *Nash-Finch Co.*, 404 U.S. at 144, and *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 155 (1982)). *Accord Ray*, 435 U.S. at 178; *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). As this Court explained in *Ray*, if a federal agency's " 'failure * * * affirmatively to exercise [its] full authority *takes on the character of a ruling* that no such regulation is appropriate or approved pursuant to the policy of the statute,' " States may not implement laws regulating in the same area. 435 U.S. at 178 (emphasis added) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

When it adopted the unanimous and detailed recommendation of the Propeller Guard Subcommittee, the Coast Guard made the considered decision that the policy of the Boat Safety Act would not be served by regulating propeller guards. That "authoritative federal determination," *Arkansas Elec.*, 461 U.S. at 384, has preemptive effect.

Petitioner and the Solicitor General cite this Court's decision in *Puerto Rico Department of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U.S. 495 (1988), where the Court explained that "deliberate federal inaction" does not always have preemptive effect:

> There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-

> emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action. [*Id.* at 503 (emphasis in original).]

See Pet. Br. 42-43; U.S. Br. 23.

The *Puerto Rico* Court, however, was asked to find what might be described as "lingering preemption:" the federal statute on which petitioners' preemption argument was based had conferred authority on the federal government to regulate the allocation and price of petroleum products, but had *expired* nearly five years before a State sought to regulate in the same area. *Id.* at 497-498. The Court was thus asked to find that federal preemption existed "despite, not only the absence of a statutory provision specifically announcing it, but the absence of *any* extant federal regulatory program with which the state regulation might conflict and which might therefore be thought to imply preemption." *Id.* at 500 (emphasis added). The Court concluded that where Congress had "withdrawn from all substantial involvement" in the field, and where there was no other "extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field" other than assorted pieces of legislative history ungrounded in any federal statute, it would not find a purportedly conflicting state law preempted. *Id.* at 504.

This case easily clears the threshold set in *Puerto Rico*. The Coast Guard's decision not to regulate was made in the traditionally federally-regulated field of maritime law, and under a fully operational statute that, like other maritime statutes, identifies uniformity of regulation as one of its primary objectives. And it was irrefutably the Coast Guard's intent, when it issued its letter adopting the investigatory subcommittee's recommendation to "take no regulatory action," to leave the issue of propeller guards—that small portion of the regulated field—without federal controls. The Coast Guard's letter, in fact, adopted in full the six-point

alternative regulatory strategy proposed by its expert advisory committee—a scheme emphasizing, among other things, consumer education and increased enforcement of safe boating practices. *See* J.A. 40-41 (subcommittee recommendations); *id.* at 80 (Coast Guard letter) ("All of the report's recommendations are accepted" [illegible] "will be implemented").[5]

That is a far cry from the sheer lack of action (ungrounded even in an extant federal statute) that failed to sway the Court in *Puerto Rico*. Indeed, the same principle this Court articulated in *Boyle* applies here as well: where an agency is regulating in a uniquely federal field, its deliberate conclusion that it will not impose requirements on a portion of that field has preemptive force—even if, in a field traditionally occupied by the States, more might be required from the agency to demonstrate sufficient intent to preempt.

Petitioner suggests that if preemption is found here, then "*any* federal decision not to regulate" may be grounds for preemption. Pet. Br. 48 (emphasis in original). That is not so, for the same reasons this Court explained in *Puerto Rico*. 485 U.S. at 503. Courts have also consistently identified a difference between the Coast Guard's well-documented decision not to regulate in this case and the mere absence of regulation in other circumstances. In *Stanley* v. *Bertram-*

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[5] The Coast Guard's approval of an alternative regulatory approach to requiring propeller guards is similar to the approach the agency took—and which was found to have preemptive effect—in *Ray*, 435 U.S. at 174. There, rather than issuing a regulation imposing size limits on tanker ships traversing Puget Sound—as it had authority to do—the Coast Guard instead implemented a navigation rule limiting passage in the sound to one tanker at a time if the ships exceeded a specified weight. *Id.* This Court concluded that a state law prohibiting tankers of a certain size from passing through the strait was preempted by the Coast Guard's alternative regulatory scheme. *Id.* at 175. So too here: the Coast Guard's decision not to require propeller guards, and its implementation of an alternative safety scheme, has preemptive force.

Trojan Inc., 855 F. Supp. 657 (S.D.N.Y. 1994), for example, the district court allowed a tort action for a negligently designed boat hatch to proceed. The court observed that the "critical difference" distinguishing that case from the propeller guard cases "is that propeller guards specifically were considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it." *Id.* at 658. Similarly, in *LaPlante* v. *Wellcraft Marine Corp.*, 114 Cal. Rptr. 2d 196, 205 (Cal. Ct. App. 2001), *review denied* (2002), the court of appeals allowed a state tort action based on failure to provide handholds, contrasting the scant evidence of the Coast Guard's consideration of that issue with the "thorough record that a conscious and intentional determination was made by the Coast Guard that boats should not be required to have propeller guards." *See also Becker* v. *U.S. Marine Co.*, 943 P.2d 700, 705 (Wash. Ct. App. 1997) (propeller guard preemption cases "represent a special situation where there is proof of the Coast Guard's considered decision not to regulate;" in contrast, Coast Guard has not "formally considered, evaluated, and rejected regulation of bow seating design"), *review denied*, 958 P.2d 313 (Wash. 1998).

Petitioner also argues that this case is "markedly similar" to *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), where this Court concluded that a state tort suit was not preempted by the federal highway safety regulatory scheme. Pet. Br. 45. The statutory preemption provision at issue in *Freightliner* provided that " '[w]henever a Federal motor vehicle safety standard * * * *is in effect*,' " all state safety standards not identical to the federal standard were preempted. *Id.* at 284 (quoting 15 U.S.C. § 1392(d)) (emphasis added). The National Highway Traffic Safety Administration promulgated a vehicular safety standard that required trucks and trailers to be equipped with antilock braking systems (ABS). A court of appeals vacated the standard, finding that the agency had not supported it with sufficient evidence. This Court concluded that state tort suits based on tractor-trailers' failure to

employ ABS were not expressly preempted, because no applicable federal safety standards were then "in effect." 514 U.S. at 286. Nor, it concluded, were such suits preempted because of a conflict between the agency's intent not to regulate and state law: the "lack of a federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes," but from a court's directive. *Id.* at 286.

This case is completely different. Here the Coast Guard *did* make "an affirmative decision * * * to refrain" from regulating propeller guards, giving rise to a conflict between its stated intent not to impose propeller guard standards and state tort suits seeking to impose those same standards. *Freightliner*, 514 U.S. at 286. In *Freightliner*, the federal agency was *trying* to require just what the state tort suits also sought: that tractor-trailers have ABS brakes.

Petitioner's amicus ATLA describes this case as "analogous" to the preemption issue this Court recently addressed in *Chao* v. *Mallard Bay Drilling Co.*, 122 S. Ct. 738 (2002). *See* ATLA Br. 28-29. It is not. The statute at issue in *Chao*, part of the Occupational Safety and Health Act, required employers to comply with safety standards promulgated by the Secretary of Labor, except that " '[n]othing in th[e Act] shall apply to working conditions of employees with respect to which other Federal agencies * * * *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.' " 122 S. Ct. at 742 (quoting 29 U.S.C. § 653(b)(1)) (emphasis added). This Court concluded that the use of the word "exercise" in that statutory provision demonstrated that "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction;" rather, the other agency must have issued regulations with respect to the same working conditions. 122 S. Ct. at 743. Because the Coast Guard in *Chao* had not issued regulations pertaining to the working conditions at

issue in that case, this Court found OSHA's jurisdiction not preempted. *Id.*

From this statute-specific holding, ATLA extracts the general notion that when the Coast Guard "fail[s] to exercise its regulatory authority," its failure to act cannot have preemptive effect. ATLA Br. 28. But while the same agency was involved in that case and this one, the similarities stop there. The statutory schemes operating in each case are completely different: most notably, the Coast Guard has sole, not contingent, federal jurisdiction over boat safety standards. Further, as even the Solicitor General recognizes, under the Boat Safety Act state statutes or regulations imposing boat safety requirements are preempted even when the Coast Guard has yet to regulate affirmatively in the area. *See* U.S. Br. at 11-12 ("unless and until the agency has promulgated a safety standard dealing with a particular matter," the Boat Safety Act "categorically precludes the States from adopting such a requirement by statute or regulation"). And the Coast Guard did not in any event "fail to exercise its regulatory authority;" it affirmatively declared that it would not require propeller guards. *See* U.S. Br., *Chao* v. *Mallard Bay Drilling Co.*, No. 00-927, at 18 (agency may "exercise" regulatory authority either by "promulgating standards or regulations" or by "articulating a policy that existing regulation is sufficient and that no additional requirements are warranted").

The Petitioner and the Solicitor General both suggest that the Coast Guard's conclusion that it would "take no regulatory action" to require propeller guards was not formal enough because interested parties were not provided an opportunity to challenge the Coast Guard's decision. *See* Pet. Br. 36; *cf. id.* at 48; U.S. Br. 25-26. But that argument is neither correct on the law nor accurate on the facts. This Court has never suggested that an affirmative decision not to regulate must be subject to notice-and-comment rulemaking. *See Geier*, 529 U.S. at 885; U.S. Br. in *Geier*, No. 98-1811, at 27 n.24 ("because conflict preemption is at issue, *neither* a

statement of preemptive intent *nor* notice and comment on preemption was required").[6] In addition, the Coast Guard took up the issue of propeller guards after petitions were filed requesting that the Coast Guard require such devices. *See, e.g.*, J.A. 18; 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). When the Coast Guard adopted the Subcommittee's recommendations and concluded that it would "take no regulatory action" to require propeller guards, its conclusion amounted to the denial of the petitions for rulemaking. That was an appealable decision. *See Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002); *American Horse Protection Ass'n* v. *Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (denial of petition for rulemaking is final agency action reviewable by an appellate court).

D. Petitioner's "Federalism" Concerns Are Misplaced.

As did petitioners and their amici in *Geier*, petitioner and his amici cast their argument as an appeal to the concept of "federalism." *See* Pet. Br. 2, 47; ATLA Br. 12; *see also* Pet. Br., *Geier*, No. 98-1811, at 17 ("This case is about federalism and the separation of powers."); ATLA Br., *Geier*, No. 98-1811, at 27-28 ("due regard for federalism counsels against

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[6] Far less formal proceedings than this detailed inquiry have led to a finding of preemption. In *American Public Health Association* v. *Butz*, 511 F.2d 331, 333-334 (D.C. Cir. 1974), for example, the court of appeals described the process by which the Department of Agriculture concluded that it would not regulate inspection for salmonella and other bacterial agents: the Department in private letters declined petitioners' request that it regulate such agents, and reiterated its position in a private meeting with petitioners. The court in *Boulahanis* v. *Prevo's Family Market, Inc.*, 583 N.W.2d 509, 512 (Mich. Ct. App. 1998), *cert. denied*, 520 U.S. 1203 (2000), concluded that those actions constituted an "intentional decision" *not* to require inspection for E. coli bacteria under the Federal Meat Inspection Act, and that the plaintiffs' tort action for failure to inspect meat for E. coli was preempted.

eliminating tort actions on the basis of obstacle preemption"). According to petitioner, States should be "free to do as they choose" in the area of boat safety if the Coast Guard has failed to issue controlling regulations on point, Pet. Br. 34, and any contrary holding would "seriously encroach on 'the constitutional role of the States as sovereign entities' " and "strip[] [them] of their power to protect and compensate their citizens." *Id.* at 47, 49.

Petitioner forgets the maritime field in which this case arises. In this field, the federal government's interest holds sway over notions of state sovereignty; preserving the primacy of the government's interest in uniform boat safety standards does nothing to "encroach" on States' traditional sovereignty rights. The Coast Guard and its expert advisory committee concluded that propeller guards could cause far more problems than they solved and were prohibitively expensive. Yet according to petitioner, lay juries in every State should be able to reexamine the same issue and force manufacturers to implement new-fangled, controversial, and potentially dangerous equipment changes that the expert agency expressly concluded were *not* required. That does not comport with Congress's consistent intent to regulate maritime issues according to central, unified standards, articulated and implemented by the federal government.

Tort judgments, moreover, affect manufacturers far beyond the jurisdiction in which they arise; such verdicts drive manufacturing changes across the national market.[7] *Cf.*

[7] In this case in particular, a tort liability verdict would present manufacturers with two particularly undesirable options. They could opt to tailor their product specifications to the standard set by Illinois—lest they face certain liability in Illinois or States that follow its lead. *See Geier*, 529 U.S. at 881. But if they include propeller guards on their products and those guards cause harm, they will face liability for negligent design of those motors—and the Propeller Guard Subcommittee's thorough report detailing the dangers of such products will be submitted as Exhibit A in that proceeding.

ATLA Br. 3 (tort suits that "requir[e] manufacturers to bear the cost of harms caused by unreasonably dangerous products * * * leav[e] decisions regarding safety to private parties responding to market forces"); *id.* at 15-16 (tort suits "provide market incentives for manufacturers to invest in safety"). State juries that articulate stringent design standards essentially dictate standards across the country; manufacturers may not risk designing products to anything other than that highest common denominator. That is not "federalism" at work; it is an affront to maritime law and to free commerce. Congress expressly stated that the field of boat equipment design should be governed by uniform standards; it preempted the field of boat safety design; it established an intricate and specialized network of experts to set those standards; and it did all that in the indisputably federal maritime field. The Coast Guard's decision not to regulate propeller guards, in light of the statute, Congress's purpose, and the goals of federal maritime law, preempts this tort case.

CONCLUSION

For the foregoing reasons, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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MAY 20 2002

No. 01-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

REX R. SPRIETSMA,

Petitioner,

v.

MERCURY MARINE,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL MARINE MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law standard or requirement that recreational boats be equipped with propeller guards, on either of two alternative grounds: (1) the Act expressly preempts any such standard or requirement unless the Secretary of Transportation has granted an explicit exemption, which has not happened here; and (2) the United States Coast Guard, after extensive administrative proceedings, has made an affirmative decision not to regulate, based in part on the determination that any such standard or requirement would be contrary to the interests of boat safety, thus negating it under settled principles of implied preemption?

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INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers is the nation's largest industrial trade association.[1] The NAM represents 14,000 member companies, including some 10,000 small and mid-sized companies. In addition, it represents 350 member associations that, in turn, serve manufacturers and employees in every industrial sector and all 50 states. All together, the NAM comprises about 18 million people who make things in America.

The National Marine Manufacturers Association comprises more than 1,200 companies, which produce about 80% of the marine products used by recreational boaters and anglers in the United States. As boat shows have become the industry's premier marketing tool, the NMMA regularly produces shows in key markets to provide quality showplaces for exhibitors and consumers. In this country, boats and related products and services account for an estimated $25 billion in retail sales annually.

Taken together, these organizations and their members all have a general interest in the interpretation and application of the various federal statutes governing transportation safety, and in determining their proper relationship to those state laws, requirements, and standards that are applied to the same matters. In addition, both the NAM and the NMMA – along with their many members who manufacture recreational vessels and associated equipment – have a direct interest in the issues raised here concerning the proper scope and effect of the preemption provisions contained in the Federal Boat Safety Act of 1971.

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[1] Both petitioner and respondent have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* state that they alone have authored this brief, and no other persons or entities have made a monetary contribution to its preparation or submission.

INTRODUCTION

The Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1994), contains three provisions that are relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

As referenced in the foregoing provision, Section 4305, which is entitled "Exemptions," provides:

> If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter.

Section 4311, which is entitled "Penalties and injunctions," addresses the various remedies that are available for violations of the Act, and also provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

These statutes must be construed in view of the specific legislative objective, which was to govern maritime commerce for vessels operating "on waters subject to the jurisdiction of the United States . . . and, for a vessel owned in the United States, on the high seas." 46 U.S.C. § 4301(a).

SUMMARY OF ARGUMENT

1. In crucial respects, the relevant provisions of the Boat Safety Act differ significantly from the analogous provisions of the Motor Vehicle Safety Act that the Court construed and applied in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Section 4306 of the statute expressly preempts those state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: (i) the States may establish, continue in effect, or enforce laws that are identical to federal regulations; (ii) the States may apply to the Secretary for an exemption from the Act or from the regulations prescribed thereunder, authorizing them to apply differing laws; and (iii) the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless the Secretary specifically disapproves such action.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance – *without regard to* whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Illinois has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local conditions. Therefore, petitioner's tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioner and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected this argument in prior cases, holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" can and do encompass state common law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503-05 (1996) (Breyer, J., concurring in part); *id.* at 509-12 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505

U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The Court's analysis of the distinct statutory scheme in *Geier* is not to the contrary, and no other justification is presented for departing from these authorities here.

Moreover, the position taken by petitioner and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and that it sets "standards" and "requirements" that govern private conduct just as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury – an *ad hoc* collection of citizens assembled to hear one case – to have more power to regulate private conduct in a manner different from the federal government than duly elected and appointed state officials. Finally, their suggested approach, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioner and the Solicitor General further contend that the so-called "saving" clause in the Boat Safety Act negates its express preemption of common-law tort suits. That, too, is incorrect, and cannot be premised on the distinct statutory scheme at issue in *Geier*. The preemption clause here contains its own saving provisions, which operate to save state law from preemption where it is identical to federal law, where an exemption is granted to authorizing the application of differing state laws, and in limited circumstances to address uniquely hazardous local conditions. Yet Section 4311(g) is more properly viewed as an "anti-affirmative-defense" clause, which simply disclaims any federal immunity from liability at state law, thus freeing each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an *otherwise permissible* state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is inconsistent with the plain language and legislative history of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "saving" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans*

World Airlines, Inc., 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioner's claims also fail under the same implied-conflict preemption analysis applied in *Geier*. As the Court has consistently held, the mere existence of a preemption clause and of a so-called "saving" clause in the Boat Safety Act does not eliminate the need for such analysis. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier*, 529 U.S. at 869.

Here, the Coast Guard invoked its statutory process for regulating boat safety to examine whether to mandate propeller guards on recreational vessels, and made an affirmative decision not to regulate by imposing such a requirement. The necessary result, therefore, is that any such requirement imposed by state law is impliedly preempted. *See Geier*, 529 U.S. at 874-86; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, the Coast Guard's explicit decision to gather more data on the costs and benefits of installing propeller guards, as well as their effect on safety, is directly inconsistent with a regime in which each State is free to require propeller guards by imposing liability (including potential punitive damages) on any manufacturer that does not install them on all of its vessels. *See Geier*, 529 U.S. at 875. Moreover, as a practical matter it would be unfair and unworkable to hold manufacturers liable for fines, penalties, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's determination that it would undermine public safety to require vessels to be equipped with propeller guards.

ARGUMENT

I. THE BOAT SAFETY ACT EXPRESSLY PREEMPTS STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The relevant provisions of the Boat Safety Act differ in critical respects from the analogous provisions of the Motor Vehicle Safety Act, which the Court construed in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Those differences are significant in determining the distinct scope of preemption under the two statutes.

In *Geier*, the Court held that the preemption clause in the Motor Vehicle Safety Act does not expressly preempt common-law claims. Based on the specific wording of that preemption provision, the Court noted that it "would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard." *Id.* at 868. The inevitable result thus would be to extinguish virtually any "potential 'liability at common law,'" and "[h]ence the broad reading [of the preemption clause] cannot be correct." *Id.*

As discussed below, however, that same analysis is not germane to the Boat Safety Act for two reasons. *First*, the Boat Safety Act contains unique language that is directly and more broadly preemptive of state law. This is understandable in the realm of maritime commerce, where the federal government has always played an especially active role. *Second*, the Boat Safety Act contains an explicit mechanism for modifying and limiting its broad preemptive scope, by granting the Secretary of Transportation express authority to grant exemptions from preemption – both from the statute itself and from any implementing regulations – in any area deemed appropriate. Indeed, the administrative history implementing the Boat Safety Act reveals that this authority has

been aggressively employed, consistent with the view that the statute itself broadly and expressly preempts state law.[2]

A. The Statutory Provisions.

The preemption clause in the Boat Safety Act provides as follows:

> *Unless permitted by the Secretary* under section 4305 of this title, a State or political subdivision of a State *may not* establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (emphasis added). Under this plain language, state law is preempted unless it imposes standards that are identical to those imposed in a federal regulation governing boat safety. Left at that, this statutory language would appear to run afoul of the same

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[2] Much of the background that the Government presents in support of its litigating position in this case differs markedly from the brief it filed on the same preemption issue in a virtually identical case just four terms ago. *See* Brief of the United States as Amicus Curiae, *Lewis v. Brunswick Corp.* (U.S. No. 97-288), *cert. dismissed*, 523 U.S. 11-13 (1998). There the Solicitor General explained that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt state law regulating the design and performance of recreational vessels and their associated equipment, subject only to certain exceptions that are specified in 46 U.S.C. § 4306 itself. *See id.* at 14-15. None of this explanation appears in the Solicitor General's brief in this case. Although the Solicitor General in *Lewis* ultimately rested on the same distinction drawn here – between common-law standards, on the one hand, and statutory or regulatory standards, on the other – this alleged distinction is unpersuasive, for reasons discussed in more detail in Sections II and III, *infra*.

concerns that the Court identified in *Geier*. But the Boat Safety Act does not leave matters there; instead, it provides an explicit mechanism for mitigating the broad scope of express preemption, which the Secretary can invoke by "issu[ing] an exemption from this chapter or a regulation prescribed under this chapter." *Id.* § 4305. In fact, the Secretary may exercise this authority whenever he can establish that "recreational vessel safety will not be adversely affected." *Id.*; *see also* 44 Fed. Reg. 21,109, 21,109-10 (Apr. 9, 1979) (exemptions from preemption "would be considered on the basis of whether they would adversely affect boating safety").

By contrast, the preemption clause of the Motor Vehicle Safety Act contains no such escape hatch and is much narrower on its face:

> When a motor vehicle safety standard *is in effect* under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. . . .

49 U.S.C. § 30103(b)(1). Indeed, with respect to a distinction that is of immense importance in the circumstances of this case, the plain language of the Motor Vehicle Safety Act creates *no preemption* in any area *unless* a federal regulation governing the same aspect of performance is in effect. By contrast, the Boat Safety Act explicitly imposes preemption – *without regard to* whether any federal regulation whatsoever is in effect – unless the Secretary has granted an exemption addressing that particular area.

As the Solicitor General explained in *Lewis*, therefore, the text of Section 4306 of the Boat Safety Act appears expressly to preempt state law regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions set forth in the preemption clause itself. *Compare* U.S. Br. in *Lewis, supra*, at 14-15 *with* U.S. Br. 11-13. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the

State, unless the Secretary specifically disapproves. *See* U.S. Br. in *Lewis, supra*, at 14-15.

As the Solicitor General further noted in *Lewis*, this reading of the broad preemption clause contained in the Boat Safety Act is confirmed by its legislative history. *See* U.S. Br. in *Lewis, supra*, at 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable," against this backdrop of broad federal preemption. *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

Moreover, the broad preemption accomplished in the Boat Safety Act was, as the Senate Report noted, squarely in line with the "long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in

interstate commerce," particularly with respect to the design and manufacture of vessels rather than their operation and use. S. Rep. No. 92-248, *supra*, at 20. The Court long ago acknowledged the same point, stating that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) (same).[3]

B. Administrative Implementation of the Statute.

In *Lewis*, the Solicitor General explained in some detail that a broad construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. in *Lewis, supra*, at 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

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[3] Although this case was brought "in an Illinois court, under Illinois law," *see* Pet. App. 7, the Illinois Supreme Court correctly recognized that it was an "admiralty" case subject to "federal maritime jurisdiction," *see id.* at 6, as even one of petitioner's *amici* concedes. *See* ATLA Br. 21-29 (arguing strenuously that the cause of action should have been understood to arise under "federal maritime common law.").

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as requirements for safety equipment to be carried on boats; design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems; and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Parts 173-75, 177, 179, 181, 183, 187 (1997); *see also* U.S. Br. 3 n.1. Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.

C. Preemption Is Proper in This Case.

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Illinois has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and

no claim has been made that they would address any uniquely hazardous local conditions. Petitioner's tort claim based on respondent's failure to install propeller guards is thus expressly preempted by the Boat Safety Act.

Moreover, there is no basis to apply some sort of presumption against preemption here. To begin with, in *Geier*, the Court specifically rejected the notion that it should impose any "special burden" on the party advocating preemption, and instead held that "ordinary preemption principles, grounded in longstanding precedent," were applicable. *See Geier*, 529 U.S. at 870-74. As discussed above, this evenhanded approach is even more obviously appropriate in the realm of maritime commerce, and in view of the more explicitly preemptive provisions of the Boat Safety Act. *See, e.g., Locke*, 529 U.S. at 108 (when "state laws . . . bear upon national and international maritime commerce, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers"). In addition, where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

Petitioner and the Solicitor General seek to avoid this straightforward result under the plain language of the statute by arguing that: (1) the preemption clause contained in Section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, Section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 12-23. These arguments miss the mark, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO ANY REQUIREMENTS IMPOSED UNDER STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioner and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Pet. Br. 25-28; U.S. Br. 13 & n.3. They thus argue that *all* common law damages actions – regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable – are immune from being expressly preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this argument in several cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring); *id.* at 510 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The reasons for the Court's repeated holdings on this point of interpretation remain sound as the Court addresses it once again in this case.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes – the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518

(quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common-law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language – particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" – the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioner here in an attempt to limit the scope of terms such as "standard" and "requirement" to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements' within the meaning of [the statute] and that the statute therefore never pre-empts common-law actions." 518 U.S. at 502 (Stevens, J., plurality opinion).

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard," when "not incompatible" with federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 518 U.S. at 504 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 510 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 502-03 (Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position it took in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument,

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[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standards of care" imposed by common law).

Medtronic, Inc. v. Lohr (U.S. No. 95-754), 518 U.S. 470 (1996), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46.

Nothing in *Geier* requires a different approach here. There the Court noted but did not resolve the issue of whether "a tort action" involves "a safety standard." 529 U.S. at 867. Instead, the Court rejected express preemption based on the inferences that it drew about the necessary effect of the particular language of the saving clause contained in the Motor Vehicle Safety Act. That issue will be addressed in Section III, *infra*.

Second, even if petitioner's argument could somehow be squared with these decisions holding that the common law *does* impose requirements and standards of care, the argument is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 518 U.S. at 510 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court has since reaffirmed this

position. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply duties and standards of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g., Medtronic*, 518 U.S. at 510 (O'Connor, J., concurring and dissenting in part) ("state common-

[8] Petitioner offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* Pet. Br. 27-28. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims.

law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 504 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioner and the *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case – a jury – to have greater power to set standards that differ from federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process. The Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 518 U.S. at 504 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down world view. Indeed, for the reasons stated above, Section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioner's argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioner and the *amici* put forward with respect to the text of Section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of decisions in civil actions not arising under federal law. *Id.* Applying the logic of petitioner's argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const., art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common

law as the governing rules of decision in federal courts. Adopting this argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made in this case to limit "requirement[s]" and "standard[s]" to state positive law must fail in this case.

III. SECTION 4311(g) CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT DIRECTLY LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains a provision that is often referred to as a "saving" clause. In this statute, the clause follows companion provisions that specify liability for civil penalties and injunctive relief; it then states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioner and the Solicitor General contend that, under *Geier*, this provision establishes common-law claims as beyond the reach of the preemption clause. *See* Pet. Br. 28-32; U.S. Br. 12-13. But that does not square with the relation between the preemption clause and this provision, with

the text of this provision, or with the clear purpose of this provision, as explained by Congress.

In *Geier*, the Court ruled that because the saving clause in the Motor Vehicle Safety Act referred specifically and solely to "liability at common law," and in the context of that statutory scheme a broad reading of the preemption clause would virtually extinguish any common-law liability whatsoever, it would be necessary to give the preemption clause "a narrow reading that excludes common-law actions." 529 U.S. at 868. As discussed above, however, *see* Section I, *supra*, the same problem does not arise under the Boat Safety Act because the Secretary is expressly empowered to preserve common-law liability by exercising his express authority to "issue an exemption" from preemption under the Act or under any regulation adopted pursuant to it. *See* 46 U.S.C. §§ 4305 & 4306. Thus, the rationale for reading the preemption clause narrowly under the Motor Vehicle Safety Act is inapplicable to the Boat Safety Act: there is no reason for this Court to assume the role that Congress conferred upon the Secretary, by construing the statute in order to grant exemptions from preemption under the Act.

In addition, the saving clause contained in the Boat Safety Act differs in a key respect from the analogous provision in the Motor Vehicle Safety Act: the saving clause here does not refer specifically and solely to common-law actions, but refers instead to "liability at common law *or under State law*." 46 U.S.C. § 4311(g) (emphasis added). The inclusion of this additional phrase thus makes clear that the ambit of this provision is broader than mere common law and does not speak specifically to common-law claims. And given that the same statute speaks of persons being "liable" for civil penalties, *see id.* §§ (b) & (c), it is evident that "liability" under "state law" cannot be narrowly construed as limited to private actions for payment of compensatory (and potentially punitive) damages, despite the Solicitor General's half-hearted argument to the contrary. *See* U.S. Br. 13 n.2. For these reasons, the notion that the preemption clause must be read narrowly to exclude common-law claims – based on a supposed need to accommodate the terms of a saving provision that applies here expansively to *all* claims for fines, penalties, or compensatory or punitive damages imposed

under state law – is simply untenable. In fact, if petitioner's reading of this provision were to be adopted, then it would become a complete "anti-preemption" clause, and *all* state law – whether statutory, administrative, or judge-made – would remain in effect as a basis for imposing liability for damages or penalties against manufacturers, thus completely nullifying the plain import of the preemption clause.

The confusion spawned by Section 4311(g) is perhaps to be expected, because in the Boat Safety Act this provision does not serve the purpose of "saving" state positive law or state common law from preemption at all. The preemption clause contains its *own* saving provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in the three distinct circumstances discussed in Section I, *supra*.

Indeed, Section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with those requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law.

Section 4311(g) should thus be understood as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements, rather than as an "anti-preemption" clause. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by Section 4306, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care

by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to Section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action, or to negate any claim for punitive damages. In practice, the States differ in their views of such an affirmative defense, and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 2002); Kan. Stat. Ann. § 60-3304(a) (2001). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few states may hold that compliance conclusively negates any defect, *e.g.*, *Beatty v. Trailmaster Prods. Inc.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

The contrary reading of this provision proposed by petitioner would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

Finally, the Court's prior cases have consistently held that the general language of a so-called "saving" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general saving clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. *See, e.g., Locke*, 529 U.S. at 106-07; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given so-called "saving" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding saving clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute") (quotation omitted); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (saving clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy") (quotation omitted).[10]

Therefore, Section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 14, proves too much, for it would exempt all state law from the reach of the preemption clause. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONER'S CLAIMS ARE ALSO IMPLIEDLY PREEMPTED BY THE COAST GUARD'S AFFIRMATIVE DECISION NOT TO REGULATE BY REQUIRING PROPELLER GUARDS.

Even if not expressly preempted, petitioner's claims would fail in this case under an implied-conflict preemption analysis. At the outset, it is important to note what is *not* at issue here: as the Court has now established, the mere existence of a preemption clause and of a so-called "saving" clause in the Boat Safety Act does not eliminate the need to apply the settled principles of implied preemption in determining the proper relationship between federal and state law. *See, e.g., Buckman, Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier*, 529 U.S. at 869.

In addition, for the reasons discussed in Section I, *supra*, the holding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), has no bearing upon the distinct statutory scheme at issue here. In *Myrick*, the Court held that state common law was not preempted either expressly or impliedly under the Motor Vehicle Safety Act where the federal agency had no safety regulation in place and this omission "did not result from an affirmative decision of agency officials to refrain from regulating." *Id.* at 286-87. The Court pointedly noted the controlling language of the federal statute, which stated that its "preemption clause applies *only* '[w]henever a Federal motor vehicle safety standard . . . is in effect' with respect to 'the same aspect of performance' regulated by a state standard." *Id.* at 286 (quoting statute) (emphasis added). As discussed previously, the operative language of the preemption clause in the Boat Safety Act is diametrically the opposite: it directly provides for preemption of state law *without regard to* whether a federal safety standard or requirement is in effect, "[u]nless permitted by the Secretary [issuing an exemption authorized] under section 4305." 46 U.S.C. § 4306.

Moreover, there is no doubt that here the Coast Guard's decision not to adopt a federal regulation governing propeller guards *did indeed* "result from an affirmative decision of agency officials to refrain from regulating." *Myrick*, 514 U.S.. at 286-87; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Neither petitioner nor the Solicitor General ever questions that fact: on May

11, 1988, the Coast Guard initiated an eighteen-month review process pursuant to the governing statute, with the explicit objective of considering whether to require manufacturers to install propeller guards and with the mandate to "consider, review, and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." J.A. 12 (National Boating Safety Adv. Ccl., Propeller Guard Subcomm. Rep., at 1 (Nov. 7, 1989)). At the culmination of that agency-initiated review process, the Coast Guard accepted all of the recommendations submitted in the Report, and decided to "take no regulatory action to require propeller guards." J.A. 80 (Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard to A. Newell Garden, Chairman, National Boating Safety Adv. Ccl., at 1 (Feb. 1, 1990)).

Instead, petitioners mount a different attack by denigrating the authority of the National Boating Safety Advisory Council, which it derides as not being composed of federal officials, *see* Pet. Br. 40-41; more surprisingly, the Solicitor General takes the same tack by seeking to dismiss the Advisory Council out of hand as not a "federal entity," *see* U.S. Br. 29. In fact, the Advisory Council is, as its name indicates, a federal entity established pursuant to federal law, *see* 46 U.S.C. § 13110, comprising numerous public officials as members, and bearing official governmental responsibilities and duties, including some set forth in the Boat Safety Act itself. Most notably for our purposes here, under the Boat Safety Act, Congress imposed a mandatory requirement that the Secretary "shall" consult with the Advisory Council before prescribing "any regulations" under the Act. *See* 46 U.S.C. § 4302(c)(1)-(4). The Advisory Council thus plays a central and essential role in the very process that is the focus of this case: the Coast Guard's process (as delegated from the Secretary) for deciding whether or not to institute safety regulations under the Boat Safety Act.

In the end, however, there is simply no dispute here – nor could it plausibly be disputed – that the Coast Guard's careful examination of the propeller guard issue and its ultimate decision at the close of that process resulted in "an affirmative decision of agency officials to refrain from regulating." *Myrick*, 514 U.S. at 286-87. Instead, the debate here is over not whether the Coast Guard *made* such an

affirmative decision not to regulate, but what the *reasons* were for its decision.

After approximately eighteen months of investigation and evaluation of testimony, statistics, and other evidence, the Advisory Council received the final report from its Propeller Guard Subcommittee, including the results of its examination of the propeller guard issue. Its recommendation was that the Coast Guard "should take no regulatory action to require propeller guards." J.A. 40. The principal basis for this recommendation was the finding that requiring propeller guards could give rise to other safety concerns, including:

> (1) increasing "the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to an ascending serious risk of fatality as speeds increase," J.A. 36;
>
> (2) creating a "new hazard . . . in that an arm, leg, etc. may be caught by the bars or ring and held against the rotating propeller. . . . with a very real risk of impacting and/or entrapping a body appendage," J.A. 36;
>
> (3) "affect[ing] boat operation adversely" at "speeds of approximately 10 mph or greater," J.A. 57.

The Advisory Council voted unanimously to approve this Report and adopt its recommendations; thereafter, it transmitted the full Report to the Coast Guard as its own submission on the subject. *See* J.A. 74-78 (Minutes of the National Boating Safety Adv. Ccl. (Nov. 7, 1989)). The Coast Guard, in turn, accepted all of the Report's recommendations and decided to "take no regulatory action to require propeller guards." J.A. 80. There is no indication at any point that the Coast Guard disapproved any of the evidence and conclusions compiled by the Advisory Council or disagreed with any of its reasoning.

In these circumstances, the implied preemption analysis in this case is controlled by *Geier*. Here, as with the duty to install an airbag pursuant to a rule imposed under state tort law, petitioners' common-law claim "by its terms would have required manufacturers of all similar [boats] to install [propeller guards]." *Geier*, 529 U.S.

at 881. This "requirement" thus would have defeated the regulatory regime adopted by the Coast Guard, which explicitly refused to "require propeller guards," J.A. 80, and instead made "an affirmative decision . . . to refrain from regulating." *Myrick*, 514 U.S. at 286-87. The approach endorsed by the Coast Guard was to continue to assess the competing safety considerations by "continu[ing] to collect and analyze accident data for changes and trends" and to review "development and testing of new propeller guarding devices or other information on the state of the art." J.A. 81. Just as in *Geier*, therefore, the agency here decided not to impose a single mandatory approach but instead to monitor a field where manufacturers tried and implemented different approaches as a way to "lower costs, overcome technical safety problems, [and] encourage technical development," all as a means of promoting its "safety objectives" in carrying out its statutory obligations under the Boat Safety Act. *Geier*, 529 U.S. at 875. Indeed, here – unlike in *Geier*, where the agency did require a fixed and increasing amount of airbag installation in new motor vehicles, *see* 529 U.S. at 878-80 – the Coast Guard decided not to require propeller guards to be installed on any boats *at all*, thus giving manufacturers maximum flexibility and making any rigid requirement imposed under state law an obvious "obstacle to the accomplishment and execution of" the agency's objectives. *Id.* at 881-82 (quotation omitted).

Accordingly, in these circumstances the Coast Guard made a considered decision not to regulate by mandating propeller guards on recreational vessels, in some measure because it had been determined that to do so would disserve the core safety objective of the Boat Safety Act.[11] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or

[11] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* in 1990 not to require propeller guards" results in implied preemption, U.S. Br. 15 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178 (quotation omitted).[12]

It would also be unfair and impractical to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that requiring the installation of propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the laws and policies of their respective governments. There can be little doubt that if any manufacturer had ignored the safety concerns and installed propeller guards, these concerns would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort identified in the agency's determination not to mandate propeller guards on recreational vessels.[13]

In sum, the Coast Guard's decision not to require propeller guards where doing so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed either by state positive law or by state common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178; *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate").

[12] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 20-22, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 173-75, 177, 179, 181, 183, 187.

[13] Propeller guards are described and depicted in the Subcommittee Report. *See* J.A. 29. In the appendix to this brief, we reproduce three photographs of propeller guards that are part of the administrative record compiled by the Subcommittee. These photographs were made available to all parties by the Coast Guard and the Solicitor General during the briefing of this case.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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